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STATE OF WISCONSIN
IN THE SUPREME COURT

TRISTA AUMAN, A MINOR,
BY HER GUARDIANS,
KEVIN AUMAN AND
RHONDA AUMAN, AND
KEVIN AUMAN AND
RHONDA AUMAN, IN THEIR
INDIVIDUAL CAPACITY,

Plaintiffs - Appellants,

vs. **Appeals Case No. 00-2356-FT**
Circuit Court Case No. 99-CV-200

SCHOOL DISTRICT OF
STANLEY-BOYD,
EMPLOYERS MUTUAL
CASUALTY COMPANY,
SECURITY LIFE INSURANCE
COMPANY OF AMERICA and
CLARK COUNTY,

Defendants - Respondents.

BRIEF OF DEFENDANTS - RESPONDENTS

Appeal from a Summary Judgment Entered July 21, 2000
in the Circuit Court for Chippewa County, Wisconsin
Honorable Roderick A. Cameron, Presiding

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STATEMENT OF ISSUE PRESENTED

Whether it is proper to allow Wisconsin public school districts and their employees to be immune from negligence claims under the recreational immunity statute, Wis. Stats. § 895.52, when a student is injured while playing outside on school property during a scheduled recess?

The trial court held that recreational immunity should apply to the facts in this case.

STATEMENT OF THE CASE

The School District of Stanley-Boyd and Employers Mutual Casualty Company, defendants-respondents, hereinafter make their separate statement of the case to supplement that made by plaintiff-appellants:

Trista Auman is a minor child who was born on February 17, 1987. *R. 18*, Trista Auman Depo., p. 4. Kevin Auman and Rhonda Auman are the parents and guardians of Trista Auman. *R. 2*, ¶ 2. The School District of Stanley-Boyd is a Wisconsin public school district located in Chippewa County; it is insured for the purposes of this action by Employers Mutual Casualty Company. *R. 2*, ¶s 3-4.

On February 11, 1998, Trista Auman was accidentally injured on school district premises at the Stanley-Boyd Elementary and Middle School. She sustained an injury while playing outside during a regularly scheduled recess from class. At that time, the girl was nearly eleven years old and attended the fifth grade. *See*, Appellants Brief and Appendix, p. 2.

Trista Auman testified she broke her leg when she ran and jumped down a snow-covered hill. *R. 18*, Trista Auman Depo., p. 23. She would run up to the top of the hill, leave her feet, jump down and land on her seat. *R. 18*, Trista Auman Depo., p. 24. While sliding to the bottom of the hill, her left foot caught in a "little hole" that had formed in the snow. *R. 18*, Trista Auman Depo., pp. 25-26. As a result, unfortunately, the girl's leg was broken.

Trista Auman also testified she now knew someone could be injured when sliding on snow, however, she was not sure she knew that on February 11, 1998. *R. 18*, Trista Auman Depo., p. 28. In any event, she was not thinking about getting hurt before her accident happened. *R. 18*, Trista Auman Depo., p. 28. The girl testified she was running, jumping and sliding on snow

because it was fun for her; she was playing. *R. 18*, Trista Auman Depo., pp. 28-29.

Plaintiffs-appellants commenced this action against defendants-respondents in June, 1999. Kevin Auman and Rhonda Auman alleged two claims on behalf of Trista Auman and made a derivative claim for themselves. Trista Auman's complaint alleges her injury occurred in violation of Wisconsin's Safe-Place Law and was proximately caused by the School District of Stanley-Boyd's negligence.[1] Plaintiffs-appellants assert the school district negligently failed to inspect, maintain and operate its "playground." *See, R. 2.*

These defendants-respondents filed their answer and affirmative defenses in July, 1999. *See, R. 4.* Two of the affirmative defenses raised in the pleadings are recreational immunity under Wis. Stats. § 895.52 and governmental immunity under Wis. Stats. § 893.80. Defendants-respondents later filed a motion for summary judgment with the circuit court. *See, R. 20.* A hearing on the summary judgment motion was

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[1] No argument has been made on appeal about the Safe-Place Law, therefore, that statute will not be discussed in defendants-respondents brief.

held on July 17, 2000, before the Honorable Roderick A. Cameron, circuit court judge for Chippewa County. *See*, *R. 33*.

Judge Cameron found there was a disputed issue of material fact which prevented him from ruling on governmental immunity. He also decided the "attractive nuisance" doctrine did not apply to the case. Lastly, the circuit court judge held the School District of Stanley-Boyd as a Wisconsin property owner was immune from liability based on the application of Wis. Stats. § 895.52. Accordingly, Judge Cameron issued an order for judgment and judgment dismissing the Aumans' civil action. *See*, *R. 25*, *33*; *See also*, Plaintiffs-Appellants Appendix, pp. 14-35.

Plaintiffs-appellants filed an expedited appeal to the District III appeals court challenging the circuit court's decision to grant recreational immunity to the school district. The court of appeals certified the expedited appeal to the supreme court under Wis. Stats. § 809.61. In its certification, the court of appeals stated:

> It is appropriate for the State's highest court to determine whether the recreational immunity statute was intended to abrogate the common law responsibility of schools and teachers to

> protect student's safety by regulating their activities. The court may also wish to consider whether the school district may be immune from lawsuit in its capacity as a landowner, but nonetheless liable in its capacity as a supervisor of children's activities. *See*, *Linville*, 184 Wis.2d at 719-20, 516 N.W.2d 427.
>
> *Auman v. School District of Stanley-Boyd*, 2001 WL 273199, * 1 (Ct. App.).

REQUEST FOR ORAL ARGUMENT

Defendants-respondents believe that while the factual and legal issues in this case have been well-developed by the parties' briefs, oral argument will be valuable and assist the supreme court in making a ruling which will have an affect on all public and private school property owners and their employees throughout the State of Wisconsin.

DEFENDANTS-RESPONDENTS ARGUMENT

Standard of Review.

The supreme court reviews a summary judgment using the same methodology as the circuit court. *See, State ex. rel. Auchinleck v. Town of LaGrange*, 200 Wis.2d 585, 591-592, 547 N.W.2d 587 (1996). The methodology of summary judgment is set forth in Wis. Stat. § 802.08(2), which provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Meyer v. School District of Colby*, 226 Wis.2d 704, 708, 595 N.W.2d 339, 341 (1999).

The issue presented in this case is one of statutory interpretation. Judicial interpretation of a statute and its application to a set of undisputed facts are ordinarily questions of law that the supreme court considers independent of any decision by the lower courts but benefitting from their analysis;

that is to say a de novo review. *See, e. g., Meyer, supra.*, Wis.2d at 708.

Recreational Immunity is Favored for Wisconsin Property Owners.

Section 895.52, Wis. Stats., was enacted by the Wisconsin Legislature in 1983 (effective May 15, 1984) and is often referred to as the recreational immunity statute. *See*, Defendants-Respondents Appendix, pp.1-5. Its passage repealed and replaced Wis. Stats. § 29.68, "Liability of Landowners," from Wisconsin's fish and game law. *See*, Defendants-Respondents Appendix, pp. 6-7. The policy behind the statute is to encourage property owners to open their lands for recreational activities by removing a property user's potential cause of action against a property owner's alleged negligence. *Linville v. City of Janesville*, 184 Wis.2d 705, 715, 516 N.W.2d 427, 430 (1994).

Prior to the creation of § 895.52, the supreme court had stated, "[b]ecause sec. 29.68 is contrary to the common law and the general public policy of the state that a person should be liable for negligently inflicting injury, the statute should be construed strictly to accomplish its legislative purpose." *See*,

LePoidevin v. Wilson, 111 Wis.2d 116, 130, 330 N.W.2d 555 (1983). ("[S]tatutes in derogation of the common law must be strictly construed."). *See also*, *Ervin v. City of Kenosha*, 159 Wis.2d 464, 475, 464 N.W.2d 654, 659 (1991). The legislature specifically declared that § 895.52's provisions should overrule any previous Wisconsin supreme court decisions interpreting § 29.68 if any such decision was more restrictive than or inconsistent with the new law. *See*, 1983 Wis. Act 418, § 1.

The general purpose behind sec. 895.52, Stats., is likewise found in the statement of legislative intent at 1983 Wis. Act 418, § 1, and reads as follows:

> **Legislative intent.** The legislature intends by this act to limit the liability of property owners towards others who use their property for recreational activities under circumstances in which the owner does not derive more than a minimal pecuniary benefit. While it is not possible to specify in a statute every activity which might constitute a recreational activity, this act provides examples of the kinds of activities that are meant to be included, and the legislature intends that, where substantially similar circumstances or activities exist, this legislation should be liberally construed in favor of property owners to protect them from liability. . . .

The supreme court has acknowledged it is clear from this language that Wis. Stats. § 895.52 is to be liberally interpreted by judges in favor of allowing recreational immunity to property owners. *See*, *Ervin v. City of Kenosha*, *supra*., Wis.2d at 476.

"Recreational activity" means any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. *See*, Wis. Stats. § 895.52(1)(g). "Recreational activity" includes, *but is not limited to*, hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature and any other outdoor sport, game or educational activity, *but does not include* any organized team sport activity sponsored by the owner of the property on which the activity takes place. *Sievert v. American Family Mutual Insurance Company*, 190 Wis.2d

623, 628, 528 N.W.2d 413, 415 (1995); *and see*, Wis. Stats. § 895.52(1)(g). (Emphasis added).

In deciding the applicability of the recreational immunity statute, the court must first determine whether the activity in which an individual was engaged at the time of his or her injury is within the statutorily defined phrase "recreational activity," sec. 895.52 (1)(g). *See*, *Sievert v. American Family Mutual Insurance Company*, 190 Wis.2d 623, 628, 528 N.W.2d 413, 415 (1995). Section 895.52 (1)(g) consists of three parts: (1) a broad definition stating that a recreational activity is "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure," (2) a list of 28 specific activities denominated as recreational, and (3) a second broad definition, directing that a recreational activity can be "any other outdoor sport, game or educational activity." *Sievert*, *supra.*, Wis.2d at 629. However, the supreme court held the first broad definition is not unlimited; but rather must be anchored to its statutory context and construed in light of the statute's list of specific recreational activities as well as the second broad definition. *See*, *Id.*

The legislature expressly stated that sec. 895.52(1)(g) was intended merely to provide examples of activities constituting recreational activities and that "where substantially similar circumstances or activities exist" the legislation should be construed liberally to protect the property owner. *See*, *Sievert v. American Family Mutual Insurance Company*, 190 Wis.2d 623,630, 528 N.W.2d 413, 415-416 (1995). The "substantially similar" language in the legislature's statement of intent has been criticized for being broad and imprecise. *Id.*, Wis.2d at 630-631. In *Linville v. City of Janesville*, 184 Wis.2d 705, 516 N.W.2d 427 (1994), the court set forth a test for ascertaining whether an activity is substantially similar to the activities listed in the statute or whether an activity is undertaken in circumstances substantially similar to the circumstances of a recreational activity. *Id.*, Wis.2d at 631.

In *Linville*, the supreme court stated the test "considers the purpose and nature of the activity in addition to the [property] user's intent." *See*, *Sievert v. American Family Mutual Insurance Company*, 190 Wis.2d 623, 631, 528 N.W.2d 413, 416 (1995). (Citations omitted; brackets in text). "The test

requires examination of all aspects of the activity. The intrinsic nature, purpose and consequence of the activity are relevant. While the injured person's subjective assessment of the activity is relevant, it is not controlling. Thus, whether the injured person intended to recreate is not dispositive, . . . but why [the person] was on the property is pertinent." *Id.* (Citations omitted; brackets in text).

The *Linville* test does not rely exclusively on the characteristics of the property on which the activity is undertaken to determine whether an activity is recreational under the statute. *Sievert v. American Family Mutual Insurance Company*, 190 Wis.2d 623, 632, 528 N.W.2d 413, 416 (1995). The court also held that, "As *Linville* teaches, the test to determine whether an activity is recreational focuses on the 'nature of the activity,' not the nature of the property." *See, Id.*

Furthermore, the supreme court found that the *Linville* test does not assess the activity of the property owner. *See, Sievert v. American Family Mutual Insurance Company*, 190 Wis.2d 623, 632, 528 N.W.2d 413, 417 (1995). The delineation of an activity as recreational does not turn on the nature of the

property owner's activity but rather on the nature of the property *user's* activity. *Id.* (Emphasis in text).

Four years after *Sievert*, the supreme court decided the case of *Meyer v. School District of Colby*, 226 Wis.2d 704, 595 N.W.2d 339 (1999). In *Meyer*, the supreme court cautioned against judicial readings of the *Linville* test which focus exclusively upon a property user's activity when deciding the scope of Wisconsin's recreational immunity statute.

Diane Meyer attended a junior varsity football game at Colby High School in 1996 to watch her son play ball. No admission fee was charged by the school district for spectators. After the game ended, Meyer was injured when she fell while exiting her seat in the bleachers. Meyer sued the school district claiming her injuries were proximately caused by the district's negligence. The School District of Colby claimed it was immune from liability under Wis. Stats. § 895.52.

The circuit court dismissed Meyer's civil action on the school district's motion for summary judgment. On Meyer's appeal, the court of appeals affirmed and specifically held that "the organized team sport activity exception [Wis. Stats. §

895.52(1)(g)] does not extend to spectators who are not participants in the excepted activity and whose injuries do not arise out of the team sport activity or the actions of the participants in that activity." *See*, *Meyer v. School District of Colby*, 226 Wis.2d 704, 706, 595 N.W.2d 339, 340 (1999). (Brackets in text).

The only issue later presented to the supreme court for resolution in *Meyer* was whether the School District of Colby had immunity from liability under Wis. Stats. 895.52. To answer this question, the court relied on its prior decisions in *Sievert* and *Linville* when it said:

> Adhering to the *Sievert-Linville* analysis in this case involving the organized team sport exception in Wis. Stats. § 895.52(1)(g), we must examine *not only the plaintiff's reason for being on the property but also the activity taking place on the property*. In other words, we must consider not only that the plaintiff was a spectator but also the activity at which the plaintiff was a spectator. If in this case the plaintiff had been sitting on the bleachers to watch a sunset or to enjoy a free band concert sponsored by the School District, the School District would not be liable for her injuries. But the plaintiff in this case was watching an organized team sport activity, an activity that is excepted as a recreational activity by § 895.52(1)(g).

> *Meyer v. School District of Colby*, 226 Wis.2d 704, 713, 595 N.W.2d 339, 343 (1999). (Emphasis added).

The supreme court reversed and ruled that nothing in the recreational immunity statute limited its express exception to actual players participating in the organized sports team activity. To support its reversal of the court of appeals, the supreme court relied upon its interpretation and application of a legislatively created exception to recreational immunity.

Here, plantiffs-appellants say that, "Recreational immunity does not apply in the present case even though the plaintiff's activity is specifically enumerated in the recreational immunity statute." *See*, Plaintiffs-Appellants Brief and Appendix, p. 6. However, the Aumans should readily concede Trista Auman's negligence claim does not fit within any of the statutory exceptions to immunity found at § 895.52 (1)(g), (3), (4), (5) and (6).

Unlike the facts in *Meyer*, the Aumans do not argue a *statutory* exception to recreational immunity exists for their claims within the text of § 895.52. Rather, plaintiffs-appellants seem to propose the supreme court should craft its own *judicial*

exception to the recreational immunity statute. But plaintiffs-appellants offer no compelling reason or rationale for this court to carve out a substantial exception to the legislature's recreational immunity statute. Such an exception, if considered by the court, would literally affect every public and private school in Wisconsin and all of their employees throughout the state.

Even though recreational immunity has been frequently litigated in Wisconsin, there is already a significant body of supreme court decisions which provide ample guidance for the state's judiciary to determine what constitutes "recreational activity" under the definitions in § 895.52. The supreme court has developed a test which allows courts to balance public policy favoring immunity from liability for public and private property owners with the rights of individuals who are injured on someone else's property.

Section 895.52, Wis. Stats., also provides its own statutory balance for injured persons because the legislature included a number of notable exceptions to recreational immunity which provide an opportunity to make a legal claim

for damages stemming from outdoor recreational injuries. *See*, Wis. Stats. 895.52 (1)(g), (3), (4), (5) and (6). Therefore, these defendants-respondents submit that a judicially drawn exception to recreational immunity which would deprive a single discrete group of Wisconsin property owners and their employees of statutory protection provided to them under § 895.52 is neither needed nor desirable.

Recreational Immunity Should Generally Apply to School Recess Injuries.

Under § 895.52(2) no public or private property owner or an officer, employee, or agent of a property owner owes to *any* person who enters the owner's property to engage in a recreational activity either (1) a duty to keep the property safe for recreational activities, (2) a duty to inspect the property, except as provided under § 23.115(2), or (3) a duty to give warning of an unsafe condition, use or activity on the property. The recreational immunity statute further provides *when* public and private property owners in Wisconsin will be held liable for recreational injuries which occur on their land. *See*, Wis. Stats. § 895.52 (1)(g), (3), (4), (5) and (6). A student who is injured while playing outside during a school recess is *not* one of the

exceptions to recreational immunity approved by the legislature for placement in § 895.52.

There is no dispute Trista Auman was injured while playing outside on school property when she slid down a snow-covered hill "for fun." No reasonable argument can be advanced which could exclude such conduct from the "recreational activity" definition at Wis. Stats. § 895.52 (1)(g). But plaintiffs-appellants assert that allowing recreational immunity to the School District of Stanley-Boyd is inappropriate for two reasons.

First, plaintiffs-appellants argue Trista Auman did not enter school property for the purposes of recreation. They say Trista Auman was on Stanley-Boyd school premises at the time of her injury because *she* was compelled to attend school there by provisions found in Wis. Stats. § 118.15. Second, plaintiffs-appellants argue that by finding the School District of Stanley-Boyd and its employees immune from liability the courts would not promote the public policy from which § 895.52 originated. *See*, Plaintiffs-Appellants Brief and Appendix, p. 5.

Addressing the first argument, Wis. Stats. § 118.15 did not compel Trista Auman to attend the school she was at when she broke her leg. The statute which plaintiffs-appellants rely upon says in part as follows:

> **118.15 Compulsory School Attendance.**
> **(1)** (a) Except as provided under pars. (b) to (d) and sub. (4), unless the child is excused under sub. (3) or has graduated from high school, *any person having under control a child who is between the ages of 6 and 18 years shall cause the child to attend school regularly* during the full period and hours, religious holidays excepted, that the public or private school in which the child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which the child becomes 18 years of age. (Emphasis added).

Therefore, it is not the student who is compelled by law to act; instead, it is the adult(s) who have care and control of the student who must comply with the compulsory attendance law.

Parents and guardians have several options on how and where their children will be schooled. Private and parochial schools are available, either in or outside of Wisconsin. Home-schooling is an alternative for some. And, there is "school choice" within the statewide public school system. All of these opportunities relate not only to the kind of education which is

available to Wisconsin's school-age children but also to where a student will physically end up attending school. Kevin Auman and Rhonda Auman made a choice on where Trista Auman would attend school; they chose the School District of Stanley-Boyd.

Plaintiffs-appellants also say Trista Auman was required to be outside during a scheduled recess per the school's rules. The Aumans argue it was not their daughter's idea to enter school owned property at recess to engage in "recreational activity." But once out of doors, plaintiffs-appellants do not dispute that Trista Auman freely and voluntarily occupied her time by sliding down a snow-covered hill on school grounds. *See*, Plaintiffs-Appellants Brief and Appendix, p. 7. In other words, she was not forced by the school district to run, jump, or slide on snow to the bottom of a hill on its premises during recess.

Moreover, Trista Auman did all of these things outside "for fun." Ordinarily, the purpose of an outdoor school recess is to give students an opportunity to play and have fun. It is a common enough fact and should be well-known to everyone.

Defendants-respondents admit Trista Auman was at school in Stanley-Boyd because that is where Kevin Auman and Rhonda Auman wanted her to get an education. But plaintiffs-respondents certainly knew while their daughter was attending school she would be spending part of her time outdoors during recess. The Aumans also knew their daughter would have the opportunity to play on school property when she went outside for recess.

Accordingly, it may be fair to say a student going indoors to attend class on school premises is by statutory definition *not* intending to engage in a "recreational activity." By the same token, it is equally fair to say a student going outside to play on school premises during recess from class *is* by statutory definition intending to engage in a "recreational activity."

Plaintiffs-appellants second argument asserts state public policy would not be promoted if immunity were found for the School District of Stanley-Boyd because it would "abrogate the common law duty that school personnel owe to children in their care." *See*, Plaintiffs-Appellants Brief and Appendix at p. 8. They say, "To allow school personnel immunity for supervision

of their charges during recess at public school would interfere with Wisconsin's public policy of protecting children while they are under the supervision of the school." *See*, *Id.* Plaintiffs-appellants suggest that the recreational immunity statute impermissibly conflicts with established common law duties of school administrators, teachers and aides.

In *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 464 N.W.2d 654 (1991), two minors drowned while swimming at a municipal beach. Kenosha employed beach lifeguards but did not train them in rescue techniques or emergency care. The parents sued the City of Kenosha for negligence. In part, they complained Kenosha was negligent in failing to train and instruct its lifeguards. They also alleged the lifeguards were negligent in performing their duties and the City should be vicariously liable for their employees' negligence. *Ervin, supra.*, Wis.2d at 469-471.

The Ervins argued when the City provided lifeguards at its beach, Kenosha assumed a duty to provide lifeguard services in a non-negligent manner. Their appeal relied on a common law principle of liability for gratuitous actions described in

American Mut. Liab. Ins. Co. v. St. Paul Fire & Marine Ins. Co., 48 Wis. 2d 305, 313, 179 N.W.2d 864 (1970). *See*, *Ervin*, *supra.*,Wis. 2d at 476. The supreme court acknowledged that application of the recreational immunity statute in the *Ervin* case conflicted with a common law duty arising from gratuitous actions of the city.

However, the court ultimately held the legislature had expressed an intent to override established common law when it enacted § 895.52. The supreme court's decision recognized that:

> The clear legislative intent was to construe sec. 895.52, Stats., in favor of landowners to protect them from liability. 1983 Wis. Act 418, sec. 1. For this reason, the principle enunciated in *American Mutual* cannot be used to narrow the scope of immunity under sec. 895.52.
>
> *Ervin*, *supra.*, Wis.2d at 476-477.

The court found even though the provisions of Wisconsin's recreational immunity statute clashed with common law rights of injured individuals, common law could not be used to judicially circumscribe statutorily granted immunity. Especially

when the legislature had expressly directed how § 895.52 should be interpreted and applied by the courts.

The Aumans finally argue that "To allow school personnel immunity for supervision of their charges during recess at public school would interfere with Wisconsin's public policy of protecting children while they are under the supervision of the school." *See*, Plaintiffs-Appellants Brief and Appendix at p. 9. This argument ignores the statutory prerequisite that a "recreational activity" must be engaged in before recreational immunity ever applies to any case.

Section 895.52 does not provide blanket immunity to schools and their employees from *all* outside accidents which might occur upon school premises. Immunity from liability for school property owners is only an issue if someone, including a school's students, sustains an outdoor recreational injury. The legislature has declared in those instances that the law, as a matter of public policy, will prohibit negligence claims by those injured.

Plaintiffs-appellants could make the very same argument against governmental immunity found at Wis. Stats. § 893.80(4)

as they do against § 895.52's grant of recreational immunity. Under the provisions of § 893.80(4), the School District of Stanley-Boyd and its employees are immune from liability for any discretionary governmental actions. This holds true even if an injured person claims that the school district and its employees negligently exercised their discretionary authority. Public policy dictates certain conduct of government entities and their employees will be immune from negligence claims, just as it does for property owners in § 895.52.

The supreme court in *Meyer* quoted with approval an observation made by the court of appeals that, "[A]s with any grant of immunity from liability, the result of applying the recreational immunity statute may seem harsh in an individual case, and it may seem incompatible with outcomes based on closely similar facts." *See, Meyer v. School District of Colby*, 226 Wis.2d 704, 709, 595 N.W.2d 339, 342 (1999) (Quoting from *Meyer v. School District of Colby*, 221 Wis.2d 513, 525, 585 N.W.2d 690 (Ct. App. 1998)). While immunity from liability for the School District of Stanley-Boyd and its employees creates a harsh result for the Aumans, that factor

alone does not provide sufficient impetus for the supreme court to judicially exclude a state-wide group of property owners and their employees from § 895.52's protection.

To sum up their position, the plaintiffs-appellants state as follows:

> In summary, the purpose of recreational immunity in encouraging landowners to open up their land to the public would not be served in the present case. The sole purpose of having public schools is to allow children on their property to educate them. Schools have to allow children on their property regardless of whether they are immune from liability. Therefore, this is not the kind of case in which the legislature intended recreational immunity to apply.
>
> *See*, Plaintiffs-Appellants Brief and Appendix, pp. 9-10.

This summation is off the mark since it fails to draw a necessary distinction; it does not focus upon outdoor recess situations at school properties.

Defendants-respondents agree the idea behind recreational immunity is to open up land for the purpose of recreation. But that purpose is also served by encouraging property owners to *continue* keeping their lands open for recreational activity. School districts do not have to allow

students to be outside on their property for recreation during recess or at any other time. Restrictions could be imposed at any time on students preventing them from ever playing on school grounds. Hopefully, that time will never have to come.

Allowing recreational immunity to the School District of Stanley-Boyd on these facts clearly promotes the goals found in the legislature's statement of intent and as confirmed by prior court opinions interpreting Wis. Stats. § 895.52. Public and private schools want children who are their students to go outside and play during recess periods to provide a break from educational classes. But schools do so with the expectation they and their employees will not potentially be held liable for every recreational injury which might happen on school property.

If public and private schools, along with their employees, are held open to liability for every student who sustains an injury outside because of his or her recreational pursuits, it may not be long before outside recess is eliminated by Wisconsin's schools. Supporting immunity from negligence lawsuits for public and private schools and their employees will help ensure the continued use of school lands by students. This is a result

envisioned by the legislature's enactment of the recreational immunity statute. It is also a result that has consistently been upheld by past Wisconsin supreme court decisions.

School Supervision of "Recreational Activity" is Entitled to § 895.52 Protection.

In its certification, the District III court of appeals outlined two issues for review by the supreme court: (1) whether the recreational immunity statute was intended to abrogate schools' and teachers' common law responsibilities to protect students' safety by regulating their activities; and, (2) even if recreational immunity applies, could a school and its employees still be held liable as supervisors of outdoor conduct engaged in by students. *See*, *Auman v. School District of Stanley-Boyd*, 2001 WL 273199, * 1 (Ct. App.). Defendants-respondents believe they have adequately addressed the first issue raised by the court of appeals. Presuming this court wishes a response to the second issue raised by the District III appeals court, these defendants-respondents hereafter discuss that court's alternative point.

The court of appeals premised their second question upon a citation to the supreme court's decision in *Linville v. City of*

Janesville, 184 Wis.2d 705, 719-720, 516 N.W.2d 427 (1994). In *Linville*, plaintiff's four-year old son drowned in a pond owned and operated by the City of Janesville for recreational purposes. The boy died one night while in a van with a man who was going to take him fishing the next day. By accident, the van ended up rolling into the pond and both were killed. The boy's mother had exited the van shortly before the accident happened. She could not rescue the man or her son and called for help. *See*, *Linville*, *supra.*, Wis.2d at 712.

City of Janesville firemen, police officers and paramedics arrived at various intervals to try and effect a rescue. They eventually pulled the van from the water and resuscitated the boy. He was taken to a hospital but could not recover. The parents and the boy's estate sued the City and some of its employees. They alleged the defendants were negligent in their rescue efforts and in their provision of medical services. *See*, *Linville*, *supra.*, Wis.2d at 712.

The circuit court dismissed the Linvilles' case against Janesville and its paramedics by summary judgment. That court found the City and its paramedics immune from liability because

of recreational and governmental immunity. *See*, *Linville*, *supra*., Wis.2d at 712-713.

On appeal, the court of appeals affirmed in part and reversed in part. With respect to recreational immunity, the appeals court held that the boy and his mother were *not* engaged in recreational activity. Therefore, immunity for the City and its paramedics under Wis. Stats. 895.52 was denied. A petition for review of the appeals court's decision was filed and granted. The supreme court affirmed the court of appeals but for reasons different from those stated by the lower court. *See*, *Linville*, *supra*., Wis.2d at 713-714.

In *Linville*, the supreme court determined that Kelly Linville and her son *were* engaged in a "recreational activity" at the time of his drowning. But the court said the case could not be fully resolved on recreational immunity grounds. The court decided it still needed to find out whether the paramedics and the City as their employer were immune in their capacity as rescuers and medical service providers. The supreme court held a distinction might exist for Janesville in its dual capacity, as property owner and public employer, which would not be within

the coverage of recreational immunity. *See*, *Linville*, *supra.*, Wis.2d at 717-718.

The legislature, in sec. 895.52, Stats., granted immunity to landowners with respect to the condition of the land and to the landowner's (or its employees') actions with respect to the land. *Linville v. City of Janesville*, 184 Wis.2d 705, 718, 516 N.W.2d 427, 431 (1994). (Parenthesis in text). Consistent with the statute's focus, the supreme court then concentrated on whether the City of Janesville as an employer of the paramedics was the same entity that owned the land.

To resolve the issue of Janesville's dual municipal role and harmonize its resolution with *Ervin v. City of Kenosha*, *supra.*, the supreme court stated that:

> The City has two distinct roles here. First, it owns the Pond. In this role it is entitled to immunity from suits claiming that the Pond was negligently maintained or that the City's or its employees' (whose employment is connected to the pond) actions with respect to the Pond were negligent. Such immunity is illustrated in *Ervin*, 159 Wis.2d 464, 464 N.W.2d 654, in which we determined that sec. 895.52(2), Stats., immunized the city of Kenosha from liability for negligently hiring and improperly training lifeguards for its public beach on which two children drown.

> On the other hand, the City operates its paramedic services for the public benefit of providing emergency medical treatment. It does not operate these services for any reason connected to the Pond. It is mere coincidence that the City is both owner of the Pond and provider of public rescue and medical treatment services. Further, the paramedics' employment, as employees of the City in this capacity, is unrelated to the Pond. The paramedics provide emergency medical treatment in every part of the City, no matter the situs. Thus the City's rescue attempts and medical treatment are separate and apart from the City's ownership of or activities as owner of recreational land. We therefore conclude that the City as the paramedics' employer is not immune from the Linvilles' claims of negligent rescue and medical treatment.
>
> *Linville v. City of Janesville*, 184 Wis.2d 705, 720-721, 516 N.W.2d 427, 432-433 (1994).

No delineation of the School District of Stanley-Boyd's roles is needed before recreational immunity can be applied here. The school district's and its employees' monitoring of outdoor recreational activity by students on school property fits well within the scope of immunity provided to the City of Kenosha and its lifeguards. Accordingly, the court of appeal's second question has been comprehensively addressed before by this court in its *Ervin* and *Linville* decisions.

CONCLUSION

The recreational immunity statute properly bars the Aumans' negligence claims. The School District of Stanley-Boyd is an "owner" as defined in Wis. Stats. § 895.52 (1)(d). Trista Auman was engaged in a "recreational activity" within the meaning of § 895.52(1)(g) which caused her injury. Accordingly, these defendants-respondents are immune from liability.

Application of the recreational immunity statute under these facts reinforces Wisconsin's public policy. Where the policy behind the enactment of § 895.52 is to encourage land owners to permit their property to be used for recreational purposes, that policy is promoted when schools are encouraged to continue keeping their premises open for students to engage in outdoor recreation during recess.

To hold a school district and its employees potentially liable for outdoor recreational injuries suffered by a student on its property during recess would directly contravene the legislative purpose for Wisconsin's recreational immunity statute. The prospect of liability for such injuries would actively

discourage the state's public and private schools, their administrators, teachers, aides and other employees, from allowing students to play outside on school property.

Plaintiff-appellants want the supreme court to devise a judicial exception to Wis. Stats. § 895.52. The Aumans are asking this court to exclude a whole class of Wisconsin's public and private property owners and their employees from protection provided to them by the legislature's promulgation of an immunity statute. But plaintiffs-appellants have failed to provide this court with a compelling legal or factual basis to institute such a drastic public policy- altering course of action. Based on the arguments raised by plaintiffs-appellants to date, the supreme court should not carve out such an exception to § 895.52.

These defendants-respondents respectfully request that the supreme court affirm the circuit court's decision to dismiss plaintiffs-appellants claims with prejudice, based upon the application of Wisconsin's recreational immunity statute, Wis. Stats. § 895.52.

Dated this 30th day of May, 2001.

WELD, RILEY, PRENN & RICCI, S.C.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced using the following font:

> Times New Roman, proportional spaced font, 13 pitch, double-spaced, and 2-inch left and right margins.

This brief contains 6,211 words as determined by WordPerfect 9.0.

Dated this 30th day of May, 2001.

WELD, RILEY, PRENN & RICCI, S.C.

By: _____
Joel L. Aberg

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Defendants-Respondents' Appendix

WEST'S WISCONSIN STATUTES ANNOTATED
MISCELLANEOUS ACTIONS, PROCEEDINGS AND PROCEDURE
CHAPTER 895. MISCELLANEOUS GENERAL PROVISIONS

Current through 2001 Act 1, published 2/1/01

895.52. Recreational activities; limitation of property owners' liability

(1) Definitions. In this section:

(a) "Governmental body" means any of the following:

1. The federal government.

2. This state.

3. A county or municipal governing body, agency, board, commission, committee, council, department, district or any other public body corporate and politic created by constitution, statute, ordinance, rule or order.

4. A governmental or quasi-governmental corporation.

5. A formally constituted subunit or an agency of subd. 1., 2., 3. or 4.

(b) "Injury" means an injury to a person or to property.

(c) "Nonprofit organization" means an organization or association not organized or conducted for pecuniary profit.

(d) "Owner" means either of the following:

1. A person, including a governmental body or nonprofit organization, that owns, leases or occupies property.

2. A governmental body or nonprofit organization that has a recreational agreement with another owner.

(e) "Private property owner" means any owner other than a governmental body or nonprofit organization.

(f) "Property" means real property and buildings, structures and improvements thereon, and the waters of the state, as defined under s. 281.01(18).

(g) "Recreational activity" means any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "Recreational activity" includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock- climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting and any other outdoor sport, game or educational activity. "Recreational activity" does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place.

(h) "Recreational agreement" means a written authorization granted by an owner to a governmental body or nonprofit organization permitting public access to all or a specified part of the owner's property for any

recreational activity.

(i) "Residential property" means a building or structure designed for and used as a private dwelling accommodation or private living quarters, and the land surrounding the building or structure within a 300-foot radius.

(2) No duty; immunity from liability. (a) Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:

1. A duty to keep the property safe for recreational activities.

2. A duty to inspect the property, except as provided under s. 23.115(2).

3. A duty to give warning of an unsafe condition, use or activity on the property.

(b) Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property or for any death or injury resulting from an attack by a wild animal.

(3) Liability; state property. Subsection (2) does not limit the liability of an officer, employee or agent of this state or of any of its agencies for either of the following:

(a) A death or injury that occurs on property of which this state or any of its agencies is the owner at any event for which the owner charges an admission fee for spectators.

(b) A death or injury caused by a malicious act or by a malicious failure to warn against an unsafe condition of which an officer, employee or agent knew, which occurs on property designated by the department of natural resources under s. 23.115 or designated by another state agency for a recreational activity.

(4) Liability; property of governmental bodies other than this state. Subsection (2) does not limit the liability of a governmental body other than this state or any of its agencies or of an officer, employee or agent of such a governmental body for either of the following:

(a) A death or injury that occurs on property of which a governmental body is the owner at any event for which the owner charges an admission fee for spectators.

(b) A death or injury caused by a malicious act or by a malicious failure to warn against an unsafe condition of which an officer, employee or agent of a governmental body knew, which occurs on property designated by the governmental body for recreational activities.

(5) Liability; property of nonprofit organizations. Subsection (2) does not limit the liability of a nonprofit organization or any of its officers, employees or agents for a death or injury caused by a malicious act or a malicious failure to warn against an unsafe condition of which an officer, employee or agent of the nonprofit organization knew, which occurs on property of which the nonprofit organization is the owner.

(6) Liability; private property. Subsection (2) does not limit the liability of a private property owner or of an employee or agent of a private property owner whose property is used for a recreational activity if any of the following conditions exist:

(a) The private property owner collects money, goods or services in payment for the use of the owner's property for the recreational activity during which the death or injury occurs, and the aggregate value of all payments received by the owner for the use of the owner's property for recreational activities during the year in which the

death or injury occurs exceeds $2,000. The following do not constitute payment to a private property owner for the use of his or her property for a recreational activity:

1. A gift of wild animals or any other product resulting from the recreational activity.

2. An indirect nonpecuniary benefit to the private property owner or to the property that results from the recreational activity.

3. A donation of money, goods or services made for the management and conservation of the resources on the property.

4. A payment of not more than $5 per person per day for permission to gather any product of nature on an owner's property.

5. A payment received from a governmental body.

6. A payment received from a nonprofit organization for a recreational agreement.

(b) The death or injury is caused by the malicious failure of the private property owner or an employee or agent of the private property owner to warn against an unsafe condition on the property, of which the private property owner knew.

(c) The death or injury is caused by a malicious act of the private property owner or of an employee or agent of a private property owner.

(d) The death or injury occurs on property owned by a private property owner to a social guest who has been expressly and individually invited by the private property owner for the specific occasion during which the death or injury occurs, if the death or injury occurs on any of the following:

1. Platted land.

2. Residential property.

3. Property within 300 feet of a building or structure on land that is classified as commercial or manufacturing under s. 70.32(2)(a)2. or 3.

(e) The death or injury is sustained by an employee of a private property owner acting within the scope of his or her duties.

(7) No duty or liability created. Except as expressly provided in this section, nothing in this section or s. 101.11 nor the common law attractive nuisance doctrine creates any duty of care or ground of liability toward any person who uses another's property for a recreational activity.

< <For credits, see Historical Note field. > >

COMMENTS--1995 ACT 223, § 8

1996 Main Volume

This bill clarifies that the owner of recreational property is immune from liability for the death of a person if the death occurs while the person is engaged in a recreational activity on the property.

HISTORICAL AND STATUTORY NOTES

2001 Electronic Update

Source:
1997 Act 242, § 1, eff. June 18, 1998.
1999 Act 185, § 193(1), eff. Sept. 1, 2000.

1999 Legislation:

1999 Act 185, § 193 provides:

"(1) Wherever 'employe', 'employes', 'employe's' or 'employes' ' appear in the statutes, 'employee', 'employees', 'employee's' or 'employees' ' are substituted.

"(2) Notwithstanding subsection (1), any person may use either spelling of these terms for any official purpose."

1997 Legislation:

1997 Act 242 amended subsec. (1)(g).

1996 Main Volume

Source:
1983 Act 418, § 5, eff. May 15, 1984.
1985 Act 29, § 2437m, eff. July 20, 1985.
1989 Act 31, § 2823m, eff. Aug. 9, 1989.
1995 Act 27, § 7215m, eff. Jan. 1, 1996.
1995 Act 223, §§ 1 to 7, eff. May 1, 1996.
1995 Act 227, § 1041, eff. Jan. 1, 1997.

Prior Laws:
L.1963, c. 89.
L.1965, c. 190.
L.1969, c. 394, § 7, eff. Feb. 12, 1970.
L.1975, c. 179, §§ 1 to 5.
L.1977, c. 26, § 27.
L.1977, c. 75, § 1.
L.1977, c. 123, § 1.
L.1977, c. 418, §§ 258m, 258p.
L.1979, c. 34, § 2102.
St.1981, § 29.68.
1983 Act 27, § 824, eff. July 2, 1983.

1983 Act 535, § 15g created another § 895.52, relating to exemption from liability of persons withdrawing blood for intoxication tests, which was renumbered § 895.53 by 1983 Act 538, § 256.

1989 Act 31, § 2823m amended subsec. (6)(a)(intro.).

1995 Act 27 amended subsec. (6)(d)3.

1995 Act 223 amended subsecs. (2)(b), (3)(a) and (b), (4)(a) and (b), (5) and (6)(a)(intro.), (b), (c), (d)(intro.) and (e).

1995 Act 227 amended subsec. (1)(f).

1983 Act 418, § 1 provides:

"Legislative intent. The legislature intends by this act to limit the liability of property owners toward others who use their property for recreational activities under circumstances in which the owner does not derive more than a minimal pecuniary benefit. While it is not possible to specify in a statute every activity which might constitute a recreational activity, this act provides examples of the kinds of activities that are meant to be included, and the legislature intends that, where substantially similar circumstances or activities exist, this legislation should be liberally construed in favor of property owners to protect them from liability. The act is intended to overrule any previous Wisconsin supreme court decisions interpreting section 29.68 of the statutes if the decision is more restrictive than or inconsistent with the provisions of this act."

CROSS REFERENCES

Hazardous substance spills, see § 292.11.

LAW REVIEW AND JOURNAL COMMENTARIES

Liability of landowner to persons entering for recreational purposes. 1964 Wis.L.Rev. 705.

Liability of owners and occupiers of land. 58 Marq.L.Rev. 609 (1975).

Szarzynski v. YMCA, Camp Minikani: Protecting nonprofit organizations from liability under recreational use statute. 1995 Wis.L.Rev. 1209.

Wisconsin's recreational use statute. Alexander T. Pendleton, 66 Wis.Law 14 (May 1993).

Wisconsin's recreational use statute: A critical analysis. 66 Marq.L.Rev. 312 (1983).

Wisconsin's recreational use statute: Towards sharpening the picture at the edges. Stuart J. Ford, 1991 Wis.L.Rev. 491 (1991).

LIBRARY REFERENCES

1996 Main Volume

Negligence ⚿37.
WESTLAW Topic No. 272.
C.J.S. Negligence §§ 63(117) et seq., 76

NOTES OF DECISIONS

fined not more than $500 or imprisoned not more than 90 days or both.

History: 1975 c. 365; 1979 c. 34; 1981 c. 20.

29.645 Larceny of game. No person shall, without permission of the owner, molest, disturb or appropriate any wild animal or the carcass or part thereof which has been lawfully reduced to possession by another.

29.65 Civil actions for damages caused by law violations. (1) The department may bring a civil action in the name of the state for the recovery of damages against any person unlawfully killing, wounding, catching, taking, trapping, or having unlawfully in possession any of the following named protected wild animals, birds, or fish, or any part of an animal, bird or fish, and the sum assessed for damages for each wild animal, bird, or fish shall be not less than the amount stated in this section:

(a) Any endangered species protected under s. 29.415 and rules adopted under s. 29.415, $875.

(b) Any moose, elk, fisher, prairie chicken or sand hill crane, $262.50.

(c) Any deer, bear, wild turkey or wild swan, $175.

(d) Any bobcat (wildcat), fox, beaver or otter, $87.50.

(e) Any coyote, raccoon or mink, $43.75.

(f) Any sharptail grouse, ruffed grouse, spruce hen, wild duck, coot, wild goose or brant, $26.25.

(g) Any pheasant, Hungarian partridge, quail, rail, Wilson's snipe, woodcock or shore bird, or protected song bird or harmless bird, $17.50.

(h) Any muskrat, rabbit or squirrel, $8.75.

(i) Any muskellunge or rock or lake sturgeon, $43.75.

(j) Any largemouth or smallmouth bass, $26.25.

(k) Any brook, rainbow, brown, or steel head trout, $26.25.

(l) Any walleye pike, northern pike, or any other game fish not mentioned in pars. (i) to (k), $8.75.

(m) Any game or fur-bearing animal or bird not mentioned in pars. (b) to (h), $17.50.

(2) Any damages recovered in such action shall be paid into the state conservation fund and disbursed therefrom by the department. The costs of such action in case of a judgment in favor of the defendant shall be paid out of the conservation fund.

(3) A civil action brought under this section shall be a bar to a criminal prosecution for the same offense and any criminal prosecution for any offense chargeable under this section shall be a bar to a civil action brought under this section.

History: 1975 c. 365; 1977 c. 386; 1979 c. 34.

The civil remedy is coextensive with the criminal sanctions of the chapter, and since the chapter does not prohibit killing fish by opening a dam unlawfully, there is no civil remedy. Dept. of Natural Resources v. Clintonville, 53 W (2d) 1, 191 NW (2d) 866.

When a criminal action is brought for a violation of ch. 94, prohibiting deposit of pesticides in public waters of the state, such proceeding is not barred by a civil action to recover the statutory value of fish killed by such pesticides. 62 Atty. Gen. 130.

29.68 Liability of landowners. (1) SAFE FOR ENTRY; NO WARNING. An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, camping, hiking, snowmobiling, berry picking, water sports, sight-seeing, cutting or removing wood, climbing of observation towers or recreational purposes, or to give warning of any unsafe condition or use of or structure or activity on the premises to persons entering for such purpose, except as provided in sub. (3).

(2) PERMISSION. An owner, lessee or occupant of premises who gives permission to another to hunt, fish, trap, camp, hike, snowmobile, sightsee, berry pick, cut or remove wood, climb observation towers or to proceed with water sports or recreational uses upon such premises does not thereby extend any assurance that the premises are safe for such purpose, or constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted, except as provided in sub. (3).

(2m) NO LIABILITY. No public owner is liable for injury or death resulting from the use of natural features, natural conditions or attack by wild animals.

(3) LIABILITY. This section does not limit the liability which would otherwise exist:

(a) For wilful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity.

(b) For injury suffered in any case where permission to hunt, fish, trap, camp, hike, snowmobile, sightsee, berry pick, cut or remove wood, climb observation towers or to proceed with water sports or recreational uses was granted for a valuable consideration other than the valuable consideration paid to the state or to a landowner by the state.

(c) For injury caused by acts of persons to whom permission to hunt, fish, trap, camp, hike, snowmobile, sightsee, berry pick, cut or remove wood, climb observation towers or to proceed with water sports or recreational uses was granted, to other persons as to whom the person

granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

(4) INJURY TO PERSON OR PROPERTY. Nothing in this section creates a duty of care or ground of liability for injury to person or property.

(5) DEFINITIONS. In this section:

(a) "Premises" includes lands, private ways and any buildings, structures and improvements thereon.

(b) "Owner" means any private citizen, a municipality as defined under s. 144.01 (6), the state, or the federal government, and for purposes of liability under s. 895.46, any employe or agent of the foregoing.

(c) "Valuable consideration" does not include contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from recreational activity, payments to landowners either in money or in kind, if the total payments do not have an aggregate value in excess of $150 annually, or those entrance fees paid to the state, its agencies or departments, municipalities as defined in s. 144.01 (6) or the U.S. government.

(d) "Natural features" include but are not limited to undesignated paths, trails and walkways and the waters of the state as defined under s. 144.01 (19).

(e) "Public owner" means a municipality as defined under s. 144.01 (6), the state, any agency of the state and for purposes of liability under s. 895.46, any employe or agent of the foregoing.

History: 1975 c. 179; 1977 c. 26 s. 75; 1977 c. 75, 123, 418; 1979 c. 34 s. 2102 (39) (g).

A visitor at a resort which allowed people to enter and which expected to sell them small items was an invitee for a valuable consideration. The exclusion for "contributions to the sound management and husbandry" is a limited exclusion. Copeland v. Larson, 46 W (2d) 337, 174 NW (2d) 745.

A city is not an owner so as to be free from liability where plaintiff fell into a trench in a public park. Goodson v. Racine, 61 W (2d) 554, 213 NW (2d) 16.

Defendant state employes were "owners" under (5) (b). Employes had no duty under this section to warn of cable strung across service road. Wirth v. Ehly, 93 W (2d) 433, 287 NW (2d) 140 (1980).

Golfing is not "recreational purpose" under this section. "Valuable consideration" limitation of $150 under (5) (c) refers to total payments made by all users during that year, not just injured user's payment. Quesenberry v. Milwaukee County, 106 W (2d) 685, 317 NW (2d) 468 (1982).

Liability of owners and occupiers of land. 58 MLR 607.

29.69 Designation of trails, etc. (1) The department shall designate trails, campgrounds, picnic areas and other special use areas for property under its control. These trails, campgrounds, picnic areas and other special use areas shall be designated on maps available at the department's district office, on a sign outside the office on the property or on signs placed by the trails, campgrounds, picnic areas or other use areas at the option of the department.

(2) The department shall inspect trail signs and designated features twice a year, once before July 1 and once after July 1.

History: 1977 c. 418.

29.99 General penalty provisions. Any person who, for himself or herself, or by his or her agent, servant, or employe, or who, as agent, servant, or employe for another, violates this chapter shall be punished, respectively, as follows:

(1) For the unlawful use of any gill net or trammel in taking, catching or killing fish of any variety in any waters, or for the use of any net in taking, catching or killing trout of any variety in inland waters, by a fine of not more than $500 or imprisonment for not more than 9 months or both.

(2) For hunting, trapping or fishing without a license duly issued, whenever a license is required by this chapter:

(a) By a forfeiture of not more than $100; and

(c) By the payment of a natural resources restitution payment equal to the amount of the statutory license fee of the license which was required and should have been obtained.

(3) For the violation of any statutes or any department order relating to the hunting, taking, transportation or possession of game or game birds of all kinds, by a forfeiture of not more than $100.

(4) For any violation of any provision of this chapter or any department order for which no other penalty is prescribed, by a forfeiture of not more than $100.

(5) For the violation of any statute or rule relating to the hunting or shooting of deer with the aid of artificial light, the snaring of deer or the taking or possession of lake sturgeon, or for violation of s. 29.48 or 29.49, by a fine of not more than $200 or imprisonment for not more than 90 days or both, and a mandatory 3-year revocation of all licenses issued to the person under this chapter.

(6) For the violation of any statutes or any department order relating to fishing, or the possession of game fish, except where some other penalty is specifically provided, by a forfeiture of $100.

(7) For the violation of s. 29.224 (4) or 29.23, or of any statute or administrative rule relating to hunting from an airplane or using an airplane to spot, rally or drive animals for hunting, by a fine of not more than $1,000 for the first violation and not more than $2,000 for subsequent violations or imprisonment for not

STATE OF WISCONSIN
IN THE SUPREME COURT

TRISTA AUMAN, a minor,
by her guardians,
KEVIN AUMAN AND RHONDA AUMAN

KEVIN AUMAN and RHONDA AUMAN,
In their individual capacity,

Appeals Case number: 00-2356-FT
Circuit Court Case number: 99-CV-200

Plaintiffs-Appellants,

SCHOOL DISTRICT OF STANLEY-BOYD,
EMPLOYERS MUTUAL CASUALTY COMPANY,
SECURITY LEFE INSURANCE COMPANY
OF AMERICA and CLARK COUNTY,

Defendants-Respondents.

AN APPEAL FROM A SUMMARY JUDGMENT ENTERED JULY 21, 2000 IN THE CIRCUIT COURT FOR CHIPPEWA COUNTY, WISCONSIN
HONORABLE RODERICK CAMERON PRESIDING

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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STATE OF WISCONSIN
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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

I. RECREATIONAL IMMUNITY DOES NOT APPLY BECAUSE THE PLAINTIFF TRISTA AUMAN WAS NOT ON SCHOOL PREMISES FOR RECREATIONAL ACTIVITY. RATHER, SHE ENTERED THE PREMISES FOR THE PURPOSE OF ATTENDING SCHOOL AND RECEIVING AN EDUCATION.

The Court should not apply recreational immunity in this case because the plaintiff, Trista Auman, did not enter school premises for the purpose of recreation. Rather, she was on school premises to attend school and receive an education.

The general rule is that landowners owe a duty of reasonable care to invitees coming onto their property. Recreational immunity creates an exception to this general common-law rule of liability. It states there is no liability for

persons coming onto the property in order to engage in a recreational activity. Sievert v. American Family Ins., 180 Wis.2d 426 (Wis. App. 1993). However, recreational immunity **only** attaches in this case if the plaintiff entered the property in order to engage in a recreational activity. Id.

The Defendant-Respondents want this Court to believe that Plaintiff-appellant has conceded that the plaintiff's activity on the school playground constituted "recreational activity" within the definition of Wis. Stat. section 895.52 (1)(g). They claim that since the plaintiff's activity on school property was clearly "recreational," the Plaintiff-appellants are asking this Court for an extraordinary remedy by carving out a judicial exception to the recreational immunity statute. (Defendant-respondents' Brief, pages 15-16 and 34).

The plaintiff, Trista Auman, is not asking this Court for a judicially-created exception to the recreational immunity statute. Rather, the issue before this Court is whether a student who is injured while playing outside during a school recess is engaging in a "recreational activity," within the meaning of the statute.

On its face, the plaintiff's jumping and sliding on a snow hill may seem to fit the definition of "recreational activity," as contained in Wis. Stat. section 895.52(1)(g). But whether recreational immunity applies requires the Court to examine all aspects of the activity, and why the person was on the property. Linville v. City of Janesville, 174 Wis.2d 571, 579-580 (Ct. App. 1993). Whether a person comes onto another's property in order to engage in a recreational activity depends upon the nature and purpose of the activity. Kosky v.

International Ass'n of Lions Clubs, 210 Wis.2d 463 (Wis. App. 1997).

First, the Court should examine all aspects of why the plaintiff entered school premises. The defendant-respondents want this Court to inappropriately focus on the plaintiff's activity at the time that she was injured. They ignore the reason that the plaintiff was on school premises. The fact is that the plaintiff, Trista Auman, entered school property earlier that day in order to attend school and receive an education. During recess, she remained on school property as part of her attendance at school and her education. The nature and purpose of her being on the school premises was not recreational.

Second, Defendant-Respondents argue that because Trista Auman's parents chose to send her to Stanley-Boyd school, she was not there involuntarily, and it would be appropriate to apply recreational immunity to her activities during recess. They assert that because she could have gone to parochial school or been home schooled, Trista Auman was there and she freely and voluntarily chose to jump on a snow hill during recess because it was fun. (Defendant-respondent's Brief, page 20). It is true that there were several educational alternatives available to plaintiff. But whether there were educational alternatives available to plaintiff is irrelevant. The point is that Trista Auman was on school property for purposes of attending school and receiving an education. Her purpose in being on school property did not change because she went outside for recess.

Previous Wisconsin cases interpreting the recreational immunity statute have not allowed the character of the plaintiff's activity to change once he or she is on the property. For instance, in Verdoljak v. Mosinee Paper Corp., 200

Wis.2d 624, 547 N.W.2d 602 (Wis. 1996), the plaintiff motorcyclist's original purpose for entering the property was to ride around and have some fun. Id., 200 Wis.2d at 628. The character of his activity did not change, even though he was riding on a trail to meet some friends at the time he was actually injured. Id. In addition, the plaintiff in Hall v. Turtle Lake Lions Club, 146 Wis.2d 486, 431 N.W.2d 696 (Wis. App. 1988), was injured at a fair while he was walking to go to the bathroom. The court in that case stated that the trip to the bathroom was a momentary diversion from the real reason that he was on the property—to attend the fair. Id., 146 Wis.2d at 489.

Likewise, Trista Auman's activities during recess were a required, temporary diversion from the real reason that she was on the property, which was to attend school and obtain an education. The defendant-respondents themselves characterize outdoor recess on school premises as "a break from educational classes." (Defendant-Respondent's Brief, page 27). Trista Auman did not come on school premises in order to recreate by jumping on a snow pile. She entered the property to attend school and receive an education, and recess was a temporary diversion from that main purpose.

II. THE DUTY OF SCHOOLS TO SUPERVISE CHILDREN WHILE ON SCHOOL PREMISES WILL BE DIMINISHED IF RECREATIONAL IMMUNITY IS APPLIED TO SCHOOL RECESS ACTIVITIES.

The liability of school personnel for the supervision of their students while attending school helps ensure that our children will be kept reasonably safe. If the Court eliminates the duty of school personnel to supervise students during outdoor recess activities, the safety of our children will be compromised.

Hopefully the day will never come that schools will allow students to be unsupervised during recess. However, the defendant-respondents contend that plaintiffs-appellants have not shown a compelling reason for this Court to find that the school district should not enjoy recreational immunity for the plaintiff's injury.

First, Defendant-respondents assume that plaintiff-appellants have conceded that Trista Auman's activity was "recreational activity," and that plaintiff-appellants are asking the Court to make a judicial exception in this case. While Trista Auman's action of jumping on a snow hill seems to be recreational, her reason for being on school premises was not recreational.

Second, the defendant-respondents ignore the significant public policy of supervision of children in Wisconsin schools. Instead, the defendant-respondents assert that granting recreational immunity for outdoor school recess injuries will ensure that schools continue recess. They contend that schools want to provide a break from educational classes for students to go outside and play, but "schools do so with the expectation they and their employees will not potentially be held liable for every recreational injury which might happen on school property." (Defendant-respondent's Brief, page 27). The defendant-respondents provide no factual or legal support for their contention that schools provide outdoor recess because they don't expect to be liable for school playground injuries. In fact, the trial court record in this particular case seems to suggest otherwise—that school personnel recognize their responsibility to make sure that students are reasonably safe on the playground.

The record in this case indicates that the head duty for the Stanley-Boyd School, Patti LaMarche, testified that all of the playground supervisors agreed that the snow pile on which the plaintiff was injured was a safety concern and that they would no longer allow children to play on it. (T.R. 22;17). Ms. LaMarche testified that a hole had formed at the bottom of the snow pile, and she recognized this as a safety concern. (T.R. 22;17). This agreement took place approximately three days before the plaintiff fell on the snow pile. (T.R. 22;17). Diane Halterman, the duty present on the playground at the time the plaintiff was injured, testified that she did not think that the snow pile in question was that dangerous. (T.R. 22;30). She did not wholeheartedly agree with Ms. LaMarche's assessment of the dangerousness of the snowpile, because the children were not pushing and shoving each other. (T.R. 22;30).

Further, the evolution of school recess has been shaped by the continued recognition by schools that they have a duty to supervise students while students are attending school. In the early days of school, it was the teacher herself who provided supervision of students during non-classroom hours such as study periods, lunch and outdoor recess. Some supervision of students during non-classroom times are still conducted by teachers themselves. However, many schools employ duties or aides who are not teachers in order to supervise students at a lower cost. The supervision of students while they are on school premises whether in or out of the classroom is a function of the duty that schools owe to students and their parents.

The defendant-respondents assert that the Wisconsin legislature intended

recreational immunity to apply to schools in order to "help ensure the continued use of school lands by students." (Defendant-respondent's Brief, page 27). They also state that application of recreational immunity to schools is a result that "has consistently been upheld by past Wisconsin supreme court decisions." (Defendant-respondent's Brief, page 27-28). Yet they cite no authority for the allegation that the recreational immunity statute applies to students attending school. There is no Wisconsin appellate court decision that has decided the issue of whether recreational immunity applies to a student who is injured while playing during recess on school property, much less a consistent rule developed by Wisconsin courts.

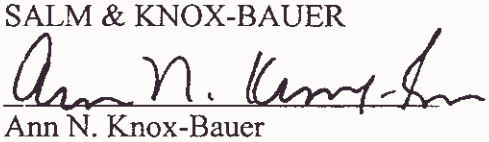
Rather, the Defendant-respondents draw an analogy between lifeguards that are gratuitously provided by a municipality and school personnel, by citing Ervin v. City of Kenosha, 159 Wis.2d 464, 464 N.W.2d 654 (1991). They argue that the supreme court in that case had decided that when the recreational immunity law clashes with common law rights of injured persons, common law could not be used to circumvent the legislative purpose of the statute. (Defendant-Respondent's Brief, page 23).

In Ervin, two children drown while swimming at a municipal beach. Id. 159 Wis.2d at 469. Their parents argued that under common law, particularly American Mut. Liab.Ins. Co. v. St. Paul Fire & Marine Ins. Co., 48 Wis.2d 305, 179 N.W.2d 864 (1970), the city assumed a duty to provide gratuitous lifeguards services in a non-negligent manner. Ervin, 159 Wis.2d at 476.

The Ervin court decided that the legislature had intended to overrule existing common law in situations of recreational immunity by enacting the recreational immunity statute, Wis. Stat. section 895.52. Id., 159 Wis.2d at 476-477. However, Ervin is a different case than the present case because in Ervin, the **boys entered the municipal property for the express purpose of recreation.** The plaintiffs in that case conceded that the boys were there to swim and swimming fit squarely into the definition of "recreational activity." In the present case, the Court needs to examine the nature, purpose and consequence of plaintiff's presence on school property in order to determine whether she was engaged in a recreational activity. The undisputed evidence demonstrates that immunity from liability does not attach because the plaintiff came onto school premises for a non-recreational purpose.

Dated this 8th day of June, 2001.

SALM & KNOX-BAUER



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (b) and (c), Wis. Stats., for a brief produced with a proportional spaced font. The length of this brief is eight pages and 2006 words.

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STATE OF WISCONSIN
IN THE SUPREME COURT

TRISTA AUMAN, a minor,
by her guardians, KEVIN AUMAN
AND RHONDA AUMAN, and
KEVIN AUMAN and RHONDA AUMAN,
in their individual capacity,

Plaintiffs-Appellants,

-vs-

SCHOOL DISTRICT OF STANLEY-BOYD, EMPLOYERS MUTUAL CASUALTY COMPANY, SECURITY LIFE INSURANCE COMPANY OF AMERICA and CLARK COUNTY,

Defendants-Respondents.

Appeals Case No. 00-2356-FT

Circuit Court Case No. 99-CV-200

Appeal from a Summary Judgment Entered July 21, 2000
in the Circuit Court for Chippewa County, Wisconsin
Honorable Roderick Cameron, Presiding

AMICUS BRIEF ON BEHALF OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS

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INTRODUCTION

The Wisconsin Academy of Trial Lawyers, an organization of Wisconsin trial attorneys, submits this brief as Amicus Curiae in support of the position advanced by the Appellants.

ARGUMENT

The recreational immunity statute does not apply (1) because compulsory recess is beyond the definition of recreational immunity set forth in the statute; (2) because applying the statute here would require the court to ignore the dictates of Wis. Stats. §§121.02(1)(i) and 120.12(5) and place those laws in direct conflict with the recreational immunity statute; and (3) because applying the statute to compulsory recess in Wisconsin public schools does not serve the statutory purpose of inducing land owners to open their property to recreational use under circumstances where the property would otherwise be closed.

The recreational use statute is a dramatic departure from the responsibilities that Wisconsin generally places on landowners.

> [T]he duty of the owner or possessor land toward persons who come upon property with the consent of the owner or possessor does not relate solely to defects or conditions which may be on such premises. Rather, the duty of an owner or possessor of land toward all persons who come upon property with the consent of the owner or occupier is that of ordinary care. The duty of ordinary care exists when it is foreseeable that an act or omission to act may cause harm to someone. The duty to exercise ordinary care in this case is the same as the duty of care in the usual negligence case.
>
> A person fails to exercise ordinary care when, without intending to do any wrong, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject him or his property, or the person or property of another, to an unreasonable risk of injury or damage.

Shannon v. Shannon, 150 Wis. 2d 434, 443, 442 N.W.2d 25 (1989) (citations omitted).

Under Wis. Stats. §895.52, a land owner has no such duty.

Members of this Court have sometimes questioned whether the results the recreational immunity statute mandates are truly what the legislature intended; on occasion, the statute's literal application has been labeled "absurd" and irrational. Ervin v. City of Kenosha, 184 Wis. 2d 875, 892, 517 N.W.2d 135, 141 (1994) (Bablitch, J. dissenting). Szarzynski v. YMCA, 159 Wis. 2d 464, 485, 464 N.W.2d 654, 663 (1991) (Abrahamson, J. dissenting).

More recently, several members of this Court have separately called for the legislature to revisit the statute,

which contains "vexing" and inherent difficulties of interpretation, Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse, 2001 WI 64, ¶43 (Bradley, J. concurring), which when applied literally can lead to "harsh" results, id. at ¶72 (Wilcox, J. dissenting); and which has lead at least one member of the Court to express "frustration with trying to apply the current version of the recreational immunity statute clearly and consistently in the myriad fact situations that have arisen," Urban v. Grasser, 2001 WI 63 ¶61 (Abrahamson, C. J. dissenting).

A. UNLESS RECONCILED THE RECREATIONAL IMMUNITY STATUTE CONFLICTS WITH TWO EDUCATION RELATED STATUTES.

Now this Court is asked to hold that Wisconsin law imposes a duty on teachers and the school district to protect

and safe guard the well-being of the grade school children in their care - unless those children are on school grounds during recess.

That result could not have been envisioned by the legislature when it passed this law. As Justice Bradley pointed out in Minnesota Fire, but for careful construction of the statute, literal interpretation would suggest the statute extends a:

> seemingly universal application" of "recreational activity" to the lives of children. With limited exception, all outdoor activities that children engage in during their idle hours might constitute a recreational activity under §895.52(1)(g).

Minnesota Fire, 2001 WI 64, ¶43 (Bradley, J. concurring). It is difficult to believe that the legislature intended that those least able to care for themselves in this society would

be among those most exposed to the statute's broad grant of immunity.

The conclusion that school teachers and playground supervisors have a responsibility to care for the children in their charge at all times except at recess is all the more difficult to accept because the legislature also passed two statutes directly to the contrary.

The recreational immunity statute, and particularly its pronouncement that no school official:

> owes to any person who enters the owner's [school] property to engage in recreational activity: a duty to keep the property safe for recreational activities, a duty to inspect the property . . . or a duty to give warning of an unsafe condition, use or activity on the property.

Wis. Stats. §895.52(2), is directly at odds with strong legislative and administrative dictates elsewhere.

The legislature passed Wis. Stats. §121.02 which set standards for Wisconsin school districts. Among those standards is the requirement that the district "provide safe and healthful facilities." Wis. Stats. §121.02(1)(i). Similarly, the legislature placed responsibilities on Wisconsin school boards in Wis. Stats. §120.12(5) to "keep the school buildings and grounds in good repair, suitably equipped and in a safe and sanitary condition at all times . . .."

Moreover, the legislature delegated administrative responsibility to implement that standard to the Wisconsin Department of Public Instruction and the Department's rule imposes a similar obligation.

> (i) *Safe and healthful facilities.* A long-range plan shall be developed, adopted, and recorded by the school board which defines the patterns and schedule for maintaining the district

> operated facilities as the level of the standards established for safe and healthful facilities. The school board shall comply with all regulations, state codes, and orders of the department of industry, labor and human relations and the department of health and social services and all applicable local safety and health codes and regulations. The facilities shall be inspected at least annually for potential or demonstrated hazards to safety and health, and hazardous conditions shall be corrected, compensating devices installed or special arrangements made to provide for safe and healthful facilities. Maintenance procedures and custodial services shall be conducted in such a manner that the safety and health of persons using the facilities are protected. Responsibility for coordinating all activities related to the safety and health considerations of the facilities for the entire district shall be assigned to one individual.

Wis. Admin. Code PI §8.01(2)(i).

The important point is that the directive in the recreational immunity statute that a school district has no duty to keep its property safe for recess, to inspect the

property, or to warn children of dangerous conditions is directly contrary to other legislative directives imposing those very responsibilities on the school.

B. RECREATIONAL ACTIVITY DOES NOT INCLUDE COMPULSORY GRADE SCHOOL RECESS.

This Court has been faced with a conflict between statutes before. The rules of statutory construction call for this Court to reconcile an apparent conflict in the statutes, if such reconciliation is possible. Bingenheimer v. DHSS, 129 Wis. 2d 100, 107, 383 N.W.2d 898, 901 (1986).

Close scrutiny of the disparate statutes here reveals that they are not in conflict because an injury on school property during compulsory recess is not the type of recreational activity covered by the statute.

The statute defines recreational activity as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity." Wis. Stats. §895.52(1)(g). The definition of recreational activity then includes 28 enumerated activities, and a proviso that the list is not intended to be complete. The statement of legislature intent includes a directive that other "substantially similar" activities may have been omitted from the list and should be judicially included in the definition. Sievert v. American Family Mutual Insurance Co., 190 Wis. 2d 623, 630 (1995). This statement of legislative intent has been criticized as "broad and imprecise." Id. at 631.

It is plain that the legislature intended the Court to review that list of 28 recreational activities, include others

that contained substantially similar characteristics and exclude activities from the statutory definition which lacked a commonality with those listed activities.

Here, review of the activities shows that they are largely sporting events, most would involve a situation where the injured party is invited on to or allowed to use the land owner's property, and none involve a common educational or school setting or circumstances where the activity is compulsory.

That last distinction is the most important. Here, the undisputed evidence shows that the Plaintiff was a grade school student who was required, as part of the school curriculum, to spend recess outdoors. The Plaintiff had no choice; all students were compelled to attend.

No Wisconsin Appellate Court has ever held compulsory activity constitutes recreational activity. In fact, review of the Statute's enumerated examples suggests otherwise.

C. THE PURPOSE BEHIND THE STATUTE IS NOT SERVED BY EXTENDING IMMUNITY TO COMPULSORY GRADE SCHOOL RECESS.

The purpose behind the statute suggests the same. It has long been settled that the purpose behind the statute is to induce property owners to open their land to others so as to allow public use of land for recreation that would otherwise be closed. The *quid pro quo* for such largesse is immunity from liability.

No such purpose is served by extending immunity to recess occurring during school hours on school grounds.

Recess is an integral part of the school day. It is included among the annual number of hours that Wisconsin students must spend in school for instruction. Wis. Admin. Code PI §801(2)(f)(2).

In Minnesota Fire, this Court recently said that the determination of whether activity is recreational in nature requires:

> examination of all aspects of the activity. The intrinsic nature, purpose and consequence of the activity are relevant. While the injured person subjective assessment of the activity is relevant, it is not controlling. Thus, whether the injured person intended to recreate is not dispositive, but why he was on the property is pertinent.

Id, 2001 64 §21, quoting Linville v. City of Janesville, 184 Wis. 2d 705, 716 (1994).

The objective Linville test shows that when one considers the nature of the circumstances - compulsory

recess - and, the nature of the property involved - public school grounds - this conduct does not constitute recreational activity within the definition employed by the statute.

Moreover, the implications of a contrary holding are widespread. Would this statute apply to an annual grade school picnic or concert? Would it apply to a university rally at the State Street square or to students who are studying in the sun on Bascom Hill at the University of Wisconsin? There are many other examples, but all seem far removed from the conventional definition of recreational activity that the legislature set forth in Wis. Stats. §895.52(1)(g).

Finally, Diane Halterman was the playground supervisor on duty during recess. By the Plaintiff's account, she was standing a few feet away when the Plaintiff fell.

According to the Plaintiff, Diane Halterman ignored a directive from Patty LaMarche, the head playground supervisor, forbidding play on the snow hill in question. Halterman disagreed that the snow pile was dangerous so evidently she did not enforce the rule.

Ms. Halterman had a single responsibility on the date of the accident. It is counter intuitive to suggest that she had no duty when, as playground superintendent, her only reason for being present was to provide for the safety and well-being of the children under her watch. Yet, according to the Defendant, Ms. Halterman had no duty to enforce school rules or to even warn of a dangerous condition or activity on school property by virtue of Wis. Stats. §895.52(2), even though she was assigned to the playground

with the sole responsibility of safeguarding the children who played there.

The Defendant argues that this case is much like Ervin v. City of Kenosha, 184 Wis. 2d 875 (1994). In Ervin, the City of Kenosha hired a lifeguard without an interview and without testing the lifeguard's ability to swim. The lifeguard had never been trained in CPR or tested for her ability to rescue, had never been involved in any rescue or first aid efforts, and had a phobia that fish and other water organisms would follow her if she entered the lake. This lifeguard stood on shore and watched two small boys drown at an isolated Kenosha beach.

Wisconsin's recreational immunity statute held that this lifeguard had no duty to try to rescue these small boys much less effectively achieve one, even though the City had

assigned her to the beach solely to protect the people who swam there.

Ervin is different from the instant case for one key reason. In Ervin, the Plaintiffs argued that the City gratuitously provided lifeguards and thereby had assumed a duty that the law did not otherwise impose. The Plaintiffs argued that by providing a lifeguard when none was required, the City was responsible for that lifeguard's failures despite the recreational immunity statute. The Court rejected that argument, finding that the recreational immunity statute overrode those long standing common law principles.

But here, the School District's responsibility to safeguard the well-being of the school children in its charge is statutory. As mentioned, Chapters 120 and 121 of the

Wisconsin Statutes as well as the administrative regulations promulgated under them, impose a wide range of duties and responsibilities on the School District and the teachers it employs. Among those responsibilities is to keep its grounds safe and hazard free so as to ensure that the children in its ward are not exposed to dangerous situations.

CONCLUSION

In summary, the recreational immunity statute does not apply because (1) compulsory recess is well beyond the definition of recreational immunity set forth in the statute, (2) applying the statute here forces this Court to ignore the dictates of Wis. Stats. §120.12(5) and §121.02(1)(i), two laws that would otherwise be in direct conflict with the recreational immunity statute, and (3) applying the statute to compulsory recess at Wisconsin public schools does not

serve the statutory purpose of encouraging land owners to open their property to recreational use under circumstances where the property would otherwise be closed.

Respectfully submitted this 19th day of July, 2001.

LIEBMANN, CONWAY, OLEJNICZAK
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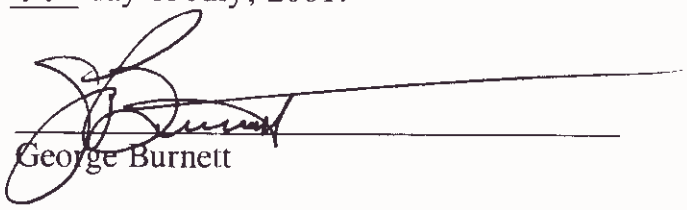
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8) (b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,368 words.

Dated this 19th day of July, 2001.



George Burnett

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

TRISTA AUMAN, a minor,
by her guardians,
KEVIN AUMAN AND RHONDA AUMAN

KEVIN AUMAN and RHONDA AUMAN,
In their individual capacity,

Case number: 00-2356

Plaintiffs-Appellants,

SCHOOL DISTRICT OF STANLEY-BOYD,
EMPLOYERS MUTUAL CASUALTY COMPANY,
SECURITY LEFE INSURANCE COMPANY
OF AMERICA and CLARK COUNTY,

Defendants-Respondents.

AN APPEAL FROM AN ORDER DISMISSING PLAINTIFFS' COMPLAINT IN CHIPPEWA COUNTY CIRCUIT COURT, HONORABLE RODERICK CAMERON PRESIDING.

BRIEF AND APPENDIX OF APPELLANTS

STATEMENT OF ISSUES

I. Whether the trial court erred when it granted the defendant's motion for summary judgment and dismissed the plaintiffs' complaint as barred by the doctrine of recreational immunity, as contained in Wis. Stat. section 895.52.

STATEMENT OF CASE

This is an appeal of the trial court's dismissal of the plaintiffs' complaint on a motion for summary judgment, entered on July 21, 2000, in the circuit court for Chippewa County, Honorable Roderick Cameron, presiding. The Court held that the

plaintiff, Trista Auman, could not sue the school district for injuries that she sustained when she fell at the Stanley-Boyd Elementary School because the claim was barred by the doctrine of recreational immunity, as contained in Wis. Stat. section 895.52.

On June 23, 1999, the plaintiffs, Trista Auman and her parents, Kevin and Rhonda Auman, filed a complaint against the School District of Stanley-Boyd and its insurer, Employers Mutual Casualty Company. The complaint alleged that the plaintiff, Trista Auman, had fallen on the school's playground, and that the school district had negligently inspected and maintained the premises, as well as failed to provide adequate supervision of Trista. (T.R. 2).

The defendants, School District of Stanley-Boyd and its insurer, Employers Mutual Casualty Company, filed a motion for summary judgment, alleging that the complaint was barred by the doctrine of governmental immunity, and that, alternatively, it was barred by the doctrine of recreational immunity. The Court denied the defendants' motion for summary judgment based upon the doctrine of governmental immunity, but granted their motion on the basis of recreational immunity. The Court held that if it did not find that recreational immunity applied, then schools would be encouraged to limit children's activities any time there is a possibility of injury. (T.R. 33, 19).

STATEMENT OF FACTS

On February 11, 1998, the plaintiff, Trista Auman, was injured while playing during recess on the playground of the Stanley-Boyd Elementary and Middle School. At that time, Trista was eleven years old and in 5th grade.

Stanley-Boyd Elementary and Middle School is a public school, and the children are required to be outside on the playground during all school recesses. (T.R. 22; 35 and

18; 22). The student handbook provides that children could not enter the school building without permission during recess, and that children are to stay and play in designated playground areas. (T.R. 18, 23).

During the last of three recesses on February 11, Plaintiff was playing on a pile of snow with other children. She and other children would run toward this pile of snow, jump on it, and slide down the other side on their backsides. Plaintiff broke her left leg when she was coming down the pile, catching her left leg into a hole that had formed on the back side of the snow mound.

The pile of snow was the result of shoveling or plowing the sidewalk, and ran parallel to a sidewalk on the playground. (T.R. 22; 13-15). The snow pile was located on the playground, approximately ten feet away from the school building. (T.R. 22; 28). According to a diagram drawn by the plaintiff, Trista Auman, the snow pile was located outside of the entrance doors to the school. (T.R. 22; 24).

Diane Halterman was one of the playground supervisors on duty during the recess that the plaintiff fell. (T.R. 18, 18). The snow pile was approximately one and one-half to three feet high on that day. (T.R. 18, 16 and 18; 11). Diane Halterman describes the snow pile as a pile created by the janitors as a result of clearing snow from the sidewalk. (T.R. 18; 16). On the other side of the snow pile, there is a big hill due to the slope of the land, which evens out at approximately 50 feet. (T.R. 18; 17).

Generally, children were allowed to play on snow piles unless they were too high, icy, or otherwise unsafe. (T.R. 18, 15) However, Diane Halterman testified that Patti LaMarche, the head supervisor, made a directive that the children were not to play on the snow pile in question. (T.R. 22, 29). Besides the principal, Patti LaMarche was in

charge of playground rules. (T.R. 22, 26). Ms. Halterman testified that she did not think the snowpile in question was that dangerous. (T.R. 22, 30). She did not wholeheartedly agree with Ms. LaMarche's assessment of the dangerousness of the snowpile, because the kids were not pushing and shoving each other. (T.R. 22; 30). Ms. Halterman acknowledged that on the day of the fall, there were probably children playing on the snow pile that she did not tell to get off, and she didn't tell them to get off because she didn't think the snowpile was that dangerous. (T.R. 22; 31).

The head playground supervisor, Patti LaMarche, testified that all of the playground supervisors, including Diane Halterman, agreed that the snow pile in question was a safety concern and that they would no longer allow the children to play on it. (T.R. 22; 17). Ms. LaMarche testified that a hole had formed at the bottom of the snow pile, and she recognized this as a safety concern. (T.R. 22; 17). This agreement took place approximately three days before the plaintiff fell on the snow pile. (T.R. 22; 17).

During the recess when the plaintiff fell, Trista Auman was jumping with a group of four or five boys. Ms. Halterman testified that a few of them were jumping, and she told them they weren't supposed to be jumping. (T.R. 22; 33). Ms. Halterman told the children two or three times to quit jumping on the snow pile, but they did not listen. The kids kept jumping, and she did not follow up with any kind of disciplinary measure, partly, because she felt the hill was not that dangerous. (T.R. 22; 34). They had been jumping for more than five minutes before Trista was injured. (T.R. 22; 32). Ms. Halterman did not know about the hole that had been formed at the bottom of the hill until after Trista fell. (T.R. 22; 35).

The plaintiff, Trista Auman, recalls that while she and the others were jumping on

the snow pile, Diane Halterman was standing on the slab of cement approximately five feet away, watching them jump on the snow pile. (T.R. 22; 21).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFFS' COMPLAINT BECAUSE THE DOCTRINE OF RECREATIONAL IMMUNITY DOES NOT APPLY IN THIS CASE, WHERE PLAINTIFF WAS ATTENDING A PUBLIC SCHOOL UNDER A COMPULSORY EDUCATION PROGRAM.

The trial court erred when it dismissed the plaintiff's Complaint, since the school district does not have recreational immunity, as prescribed in Wis. Stat. Section 895.52. In reviewing the trial court's decision, this Court should review it de novo. Whether the recreational immunity statute bars a lawsuit is a question of law that this Court reviews de novo. Kosky v. International Ass'n of Lions Clubs, 210 Wis.2d 463 (Wis. App. 1997).

Recreational immunity does not apply in this case for two reasons. First, the plaintiff, Trista Auman, did not enter school property for purposes of recreation. Rather, she was required to be on the premises for compulsory education. Second, holding the school district immune in this circumstance does not promote the public policy reasons of recreational immunity.

Recreational immunity doesn't apply because the plaintiff, Trista Auman, did not enter the school property for purposes of recreation. Wis. Stat. Section 895.52, states in pertinent part,

> **(2) No duty; immunity from liability.**
>
> (a)...no owner and no officer, employee or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:

1. A duty to keep the property safe for recreational activities.

2. A duty to inspect the property...

3. A duty to give warning of an unsafe condition, use or activity on the property.

(b)...no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property..."

Recreational immunity only attaches when the person comes onto the property in order to engage in a recreational activity. Sievert v. American Family Mut. Ins. Co., 180 Wis.2d 426 (Wis. App. 1993). Whether a person comes onto the property of another for recreational activity depends upon the nature and purpose of the activity, in addition to the person's subjective intent in entering the property. Kosky , 210 Wis.2d 463 at 473.

A land user's subjective intent is not dispositive in determining whether he or she is engaging in a recreational activity. As this Court stated in Linville v. City of Janesville, 174 Wis.2d 571, 579-80 (Ct. App. 1993):

"The test requires examination of all aspects of the activity. The intrinsic nature, purpose and consequence of the activity are relevant. While the injured person's subjective assessment of the activity is relevant, it is not controlling. Thus, whether the injured person intended to recreate is not dispositive, but why he was on the property is pertinent."

Id.

Recreational immunity does not apply in the present case even though the plaintiff's activity is specifically enumerated in the recreational immunity statute. For instance, in Silingo v. Village of Mukwonago, 156 Wis.2d 536 (Wis. App. 1990), this Court found that the plaintiff's attendance at the Maxwell Street Days event, while akin to "sightseeing," was not recreational, after examining all social and economic aspects

surrounding the use of the land. Id. 156 Wis.2d 536, 544.

In the present case, the plaintiff, Trista Auman, was on school premises because she was compelled to do so by Wis. Stat. section 118.15, which makes school attendance compulsory. The defendant argues that the plaintiff, Trista Auman, was engaged in a recreational activity because she agreed that she was sliding down the snow hill during recess because it "was fun." (T.R. 33, 17). However, the plaintiff entered onto the school playground because she was required to attend school by Wisconsin law, and she was required to be outside on the playground during recess, per the school's rules. (T.R. 22; 35 and 18; 22). The plaintiff did not enter the school playground initially for purposes of engaging in a recreational activity, ie, to go sliding on a snow hill. Rather, she entered the playground because she was required to do so, and sliding down the snow hill was a way to occupy her time during recess.

Further, the defendant argues that even though the plaintiff, Trista Auman was required to be outside on the playground during recess, she did not have to slide down the snow hill. (T.R. 33, 17). The defendant suggests that during recess, the children do not have to recreate, rather they can stand outside the doors and talk to their friends. (T.R. 33; 17). There is no meaningful distinction between talking to friends at the door and sliding down a snow hill—both would be considered "recreational" if the statute applies.

In Silingo, previously cited, this Court held that the relevant considerations in determining the applicability of recreational immunity are: the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity's purpose and consequence. Id. 156 Wis.2d at 544.

Nor should this Court apply recreational immunity on the basis that an

"educational activity" constitutes a recreational activity. The defendant argues that recreational immunity applies in this case because the definition of recreational activity includes:

> "...any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including the practice or instruction in any such activity. "Recreational activity" includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting and any other outdoor sport, game or **educational activity...**"

Wis. Stat. Section 895.52(1)(g). (emphasis added).

The context in which "educational activity" is used does not seem to referring to the recess activities of students attending a public school in a compulsory situation. Rather, the definition seems to be referring to a voluntary engagement of one's self in an outdoor learning experience, similar to an outdoor sport or an outdoor game.

Second, there is no evidence in the recreational immunity statute of a legislative intent to abrogate the common law duty that school personnel owe to children in their care. Wisconsin law has traditionally held school teachers to the same standard as that for parents. Lueck v. City of Janesville, 57 Wis.2d 254, 262-63, (1973), Cirillo v. Milwaukee, 34 Wis.2d 705, (1967), and Larry v. Commercial Union Ins. Co., 88 Wis.2d 728, 738, (1979) (applying same standard to day care provider). Nothing in the recreational immunity statute evidences a legislative intent to abrogate this common law duty. In Cirillo, previously cited, the Wisconsin Supreme Court stated that a teacher is "neither immune from liability nor is he the insurer of his student's safety, but he is liable for injuries resulting from his failure to use reasonable care." 34 Wis.2d at 714.

To allow school personnel immunity for supervision of their charges during recess at public school would interfere with Wisconsin's public policy of protecting children while they are under the supervision of the school. In Bystery v. Village of Sauk City, 146 Wis.2d 247 (Wis. App. 1988), this Court refused to apply recreational immunity to a municipality's maintenance of sidewalks because of the strong legislative policy requiring municipalities to take care of their sidewalks.

In Bystery, the plaintiff was injured while riding her bicycle on the city's sidewalk. The city argued that recreational immunity should apply as an inducement to cities to permit sidewalk use for bicycling. The Court of Appeals rejected that argument, stating that the position would mean that liability would depend upon the bicyclist's subjective intent of why the person was riding the bicycle there. Likewise, in the instance case, application of the recreational immunity statute would not effectuate the policy of encouraging schools to open up their property for recreation, when students are already required by law to be on school property for education. This would be a different case if the plaintiff had voluntarily come onto school property while school was not in session in order to jump on the snow hill. But while a child is in school, there is an overriding duty of the school to tend to children as if they were the children's parents, that does not exist in the cases interpreting the recreational immunity statute. Application of the statute in the case would effectively eliminate the school's duty to supervise students during physical education classes, academic classes or activities during school hours that are held outside on school premises.

In summary, the purpose of recreational immunity in encouraging landowners to open up their land to the public would not be served in the present case. The sole

purpose of having public schools is to allow children on their property to educate them. Schools have to allow children on their property regardless of whether they are immune from liability. Therefore, this is not the kind of case in which the legislature intended recreational immunity to apply.

CONCLUSION

This Court should reverse the trial court's dismissal of plaintiffs' Complaint, as it is not barred by the doctrine of recreational immunity, and remand it for a trial.

Dated this 1st day of November, 2000.

SALM & KNOX-BAUER

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c), Wis. Stats., as modified by court order, for a brief and appendix produced with a monospaced font. The length of this brief is ten (10) pages and 2,688 words.

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APPENDIX

APPENDIX TABLE OF CONTENTS

STATE OF WISCONSIN CIRCUIT COURT Branch I CHIPPEWA COUNTY

TRISTA AUMAN, a minor,
by her guardians, KEVIN AUMAN
and RHONDA AUMAN,

and

KEVIN AUMAN and RHONDA AUMAN,
in their individual capacity,

Plaintiffs,

vs.

SCHOOL DISTRICT OF STANLEY-BOYD,
EMPLOYERS MUTUAL CASUALTY COMPANY,
SECURITY LIFE INSURANCE COMPANY
OF AMERICA,

and

CLARK COUNTY,

Defendants.

TRANSCRIPT OF PROCEEDINGS
Case No. 99 CV 200
(Summary Judgment Motion)

The above-entitled matter coming on to be heard before the Honorable Roderick A. Cameron, Circuit Court Judge, on the 17th day of July, 2000, commencing at the hour of 8:30 a.m. in the Courthouse in the City of Chippewa Falls, County of Chippewa, State of Wisconsin.

APPEARANCES:

ANN N. KNOX-BAUER, Salm & Knox-Bauer, Stanley, Wisconsin, appearing as counsel for and on behalf of the Plaintiffs.

THOMAS J. GRAHAM, Weld, Riley, Prenn & Ricci, Eau Claire, Wisconsin, appearing as counsel for and on behalf of the Defendants School District of Stanley-Boyd and Employers Mutual Casualty Company.

MR. GRAHAM: This is in the matter of Trista Auman, Kevin Auman and Rhonda Auman vs. School District of Stanley-Boyd, Employers Mutual Casualty Company and others. Appearances this morning are Ann Knox-Bauer appearing on behalf of plaintiff and Tom Graham appearing on behalf of defendants School District of Stanley-Boyd and Employers Mutual Casualty Company.

This is the time that has been set for argument on Summary Judgment Motions. The defendants have filed a motion, with supporting affidavit and brief. There has been a reply to that and a response by the defendant as well. We're prepared for some brief oral argument, if you would like.

THE COURT: Sure.

MR. GRAHAM: Okay. Being the moving party, Your Honor, first of all, with respect to the issue of whether there was an established rule which will take the discretionary portion of the school district's duty out of that discretionary area and into a ministerial area, I think the evidence speaks to essentially an issue where the playground supervisors were charged with using their discretion to prevent certain types of activities on the playground as they see them. There are established written rules, one of which says there are no such games -- no games such as king of the hill, smear the queer, things

like that, and I'm not sure what the latter game is, but, at any rate, the fixed rules of the school district prohibited those types of games.

Essentially, the testimony indicates that, beyond those types of games and those types of activities, it is within the discretion of the playground supervisors to enforce certain things. Another prohibited activity in the written rules is no snowball throwing. There's no written rule of the school district that says you cannot play on a snowbank and it essentially becomes a safety issue with that particular playground supervisor as to whether they believe in their discretion a safety issue is arising with respect to playing on some type of a hill or a mound or whatever.

In this case, this accident occurred on a mound or a hill, whatever you wish to call it, that was anywhere, by estimates, from a foot-and-a-half to three feet in height. It was created where a sidewalk had been plowed with, I believe, a straight plow, or something like a garden tractor, so that you would have just a small snowbank next to the sidewalk, and beyond that snowbank, the ground fell away, so you would have a long, sloping hill, gradual hill. In this case, the children would occasionally play on top of that snowbank, and over the course of a period of time, the kids would slide down that

hill.

At the time of the accident, the plaintiff was getting a short run across a sidewalk, up onto the hill, would leave their feet, get onto their seat and kind of slide down the hill. These were, I believe, seventh graders at the time of this accident that were involved in the accident. A couple of days before this -- the day of the accident, one of the playground supervisors had told them not to do that type of activity. She saw a hole that was forming on the back side of that snowbank where they would jump onto it when their feet landed, and before they got onto their seat, they would start to create a hole. She saw that and told them not to. In fact, I think the day before the incident the supervisor who was there on the date of the accident told the children likewise not to do that. On the day of the accident they continued to do that and she, I believe, indicated that they shouldn't be doing that, but allowed them to do that for a period of time.

It's really an issue of not so much a mandatory rule that the playground supervisors have to follow, it's what in their discretion is creating a safety issue. If the kids are up on top and simply sitting down and sliding down that hill, it's perfectly acceptable because it's not creating a safety issue for the school district and they don't have to stop the kids from doing

that type of activity. I think it's clearly discretionary within that playground supervisor whether they allow them to slide down that hill or not.

The plaintiff also raised an issue with respect to whether this activity instituted a known danger, and I think what you have to view is view this from the standpoint of Diane Halterman, who was the playground supervisor on the day of the accident, and did that activity of jumping onto the snowbank and sliding down the back side of it, did that create and was there a known danger for the children that was known to her. She testified clearly in her testimony that she knew of no hole and saw no hole despite her being out there and walking in this area and standing in this area. She knew of no hole that was being formed on the back side of the snowbank.

THE COURT: Isn't there a fact issue here? Ms. Knox-Bauer's brief alleges that Patty LaMarche told everybody a day or two earlier that there was a hole forming at a meeting.

MR. GRAHAM: You're correct --

THE COURT: Doesn't that give her notice of the hole?

MR. GRAHAM: -- that is a fact issue with respect to whether there is a known danger to her or to the children.

THE COURT: Okay.

MR. GRAHAM: With respect to whether an attractive nuisance was created by the school district, I think that, if I could use a bad pun, could create a slippery slope from which we could not return because land owners in Northwest Wisconsin every day of the winter virtually create snowbanks that would subject them to liability by any children that may play on those snowbanks. I don't think the criteria of an attractive nuisance has been met in this case -- and we have touched on that in our brief -- I think especially when there is a situation where a seventh grader realized the risk of playing on a snowbank.

Lastly, with respect to the recreational immunity statute, I think that's on all fours in this case. I don't think there's any issue of fact that would prevent the Court from dismissing this case on that basis. It is clear that the activity engaged in at the time of the accident was a recreational in nature. Plaintiff argues the purpose -- at least that she must have entered the school with a duel purpose in mind and I would expect that the law would be construed such as that if one enters a premises with a duel purpose in mind knowing that recreating on the property is one of those purposes, then there is immunity for that recreational part of the

activity.

And here there's no question that playing on a snowbank or going out for recess falls within the same type of activities as the statute enumerates being within the recreational category. So I would expect that the statute would prohibit liability in this situation, where the children go out -- leave the classroom setting per se and go out and engage in recreational-type activities. Playing kick ball or playing on snowbanks or, you know, doing whatever they do in the wintertime, that is a recreational activity.

The plaintiff admitted that she was doing this activity because it was fun. It's an activity that I think falls well within the bounds of the enumerated activities in this statute.

I ask the Court to grant Summary Judgment on the basis set forth in the brief.

THE COURT: Is there any conflict between the absence of a discretionary situation and recreational immunity? Just assuming -- I am not saying I'm deciding this -- what if there's recreational immunity, but there is a nondiscretionary duty?

MR. GRAHAM: I don't think there is any conflict between the two because the statute simply prohibits liability on a landowner when activities are

being engaged in of a recreational nature irrespective of what the landowner is doing. The purpose of the statute is to encourage the recreational use and opening up of the property for recreational use. If you start defining then whether the activity of the landowner was mandatory or discretionary, I think you're going against the grains of the statute. The statute simply provides an absolute immunity from suit for those activities when someone engages in recreational activity.

THE COURT: Ms. Knox-Bauer, let's hear your arguments.

MS. KNOX-BAUER: Your Honor, I think the crucial fact that makes this summary judgment turn on one point to the another was omitted from the defendant's brief and, that is, the testimony of Patty LaMarche who was the head playground supervisor. She testified at her deposition the way the playground rules were, what they allow the kids to do or not allow the kids to do on the playground, arising throughout the year in informal conversations between or among the duties. Patty testified that at that point either she would approach the principal herself in order to get a memo, to get the principal's input on it, or sometimes the duties among themselves would decide whether or not they should allow children to do certain things. And that's the crucial difference here.

Patty's testimony is: Three days prior to Trista's fall she had looked at the snow pile and seen holes were forming at the bottom of it and it was this fact that she pointed out to the other duties in informal discussion like they had many times before. That's where the discretion was exercised at that point.

It's analogous to the type of cases where we have a traffic sign, where someone sues a town or municipality for not putting up a stop sign at an intersection. When a town board has a discussion to determine whether they should put up a stop sign at a particular intersection, that's the kind of conduct or action that is protected by discretionary immunity because they're exercising their discretion to determine whether or not they should put up a stop sign. Once they have made the decision, they have stepped over the threshold from discretionary and they have decided to put the stop sign up, that's the point it becomes a ministerial act, and that's analogous to this situation.

There is a case cited in my brief that used the premise of liability versus someone in an auto accident because a stop sign wasn't up or because the intersection was improperly signed.

Once the duties had established the rule according to the way they had in the past and exercised

their discretion, it then became a ministerial duty to carry out the rule that had been established by the duties. This would be a different situation if the rule had been established that Diane Halterman and all other duties were to -- were to prohibit children from jumping on snow piles that they, upon their own inspection or their own determination, determined to be either too high or dangerous in some other way.

That wasn't the rule that was established. According to Ms. LaMarche, the rule that was established was this particular snow hill that Trista fell on three days later, the children were not to jump on that. That was the rule that was established. Then it becomes a question of fact of negligence as to whether Ms. Halterman, who was the duty at the time of Trista's fall, to determine whether there was negligence in carrying out that ministerial duty. Once the discretionary exercise -- the exercise of discretion in establishing the rule had been done, then it's a matter of performance of a proper described task, which was keeping the children off the snow hill.

Your Honor, in regard to the issue of whether the snow hill presented a known danger, I would point out to the Court that, yes, this snow hill is a small one. It was probably between one and a half to two feet or three

feet high, but on the other side of it there was a 50-foot slope.

THE COURT: Did somebody measure that?

MS. KNOX-BAUER: It was an estimation. It was because of the -- that there's an actual hill there that sloped down the lay of the land.

THE COURT: I have seen that hill, but I thought it wasn't anywhere close to that.

MS. KNOX-BAUER: Apparently, they put in sidewalks a few years ago, and I don't know if that changed the landscape of it, but that was an estimation.

THE COURT: It would be like three times as high as the ceiling in this courtroom.

MR. GRAHAM: I'm not sure whether this measurement of 50 feet was runoff of 50 feet where you would go down or whether it was a elevation of 50 feet.

THE COURT: I don't think it's probably 50-feet elevation.

MR. GRAHAM: I agree with the Court. I have seen it.

MS. KNOX-BAUER: Right. It would be considerably higher. That's what made the hill so attractive to these students.

The Court, for purposes of this Summary Judgment Motion, needs to look at the facts most favorable

to the plaintiff, and when you take a look at the testimony of Diane Halterman versus Patty LaMarche, Patty LaMarche has a significantly different recollection of how this whole situation went down. And there was a question of fact as to when this was a known danger.

As far as the attractive nuisance argument goes, it's not the inherent problem with snowbanks -- I mean, living in Wisconsin, we have snowbanks all over the place and kids that grow up in Wisconsin, you know, take them for what they're worth -- but it's the creation of the hole at the bottom of the snowbank that -- that created a situation of attractive nuisance in that it wasn't something that was readily apparent to children who were jumping off the top of this hill, sliding down on their rear ends and coming to the bottom of it. And that's the distinction between characterizing this just simply as one-to three-foot-high snow pile that kids are jumping down.

Your Honor, I think the recreational immunity argument is trying to put a square peg into a round hole. It's just doesn't fit. The distinctions that I've outlined in my brief are significant ones.

First, the statute, by its plain language, talks about the plaintiff coming onto the land for purposes of recreational activity. By the plain language of it, Trista Auman, the plaintiff, was not coming onto the land

for purposes of recreation.

THE COURT: Wasn't she coming on that part of the school property for purposes of recreation?

MS. KNOX-BAUER: Your Honor, the undisputed facts show that she had to be outside for the recess period.

THE COURT: She didn't have to go over to that part of it.

MS. KNOX-BAUER: The part where the snowbank was right outside, a few feet away from the doors for the entrance and exit of the school, so it was in the immediate playground area where the snow hill was located. It was located a few feet away from the entrance/exit of it. And she was required to be there. The only time she could stay in from recess is if she had a doctor's excuse or if it was too cold for the children to play outside.

And, secondly, the purpose of recreational immunity is to encourage landowners, particularly private landowners, to open up their land for purposes of recreation so that people can enjoy it. And whether -- and applying recreational immunity to school districts isn't going to facilitate that kind of public policy, which is the main thrust of recreational immunity, the reason the Legislature passed it in the first place.

The school is going to have to provide a

place for children to play on a playground regardless whether they are given recreational immunity. In other words, the idea that school boards sit down and say, "Okay, we're not going to add this merry-go-round to our playground because we might get sued if someone got hurt on it" is not a factor in terms of recreational immunity.

THE COURT: Haven't some school districts prohibited recess?

MS. KNOX-BAUER: Pardon me?

THE COURT: Some school districts have prohibited recess I read. Might though be a problem here if I found there is no recreational immunity.

MS. KNOX-BAUER: The school districts that have prohibited recess, I guess not going to be hurt on a playground because the playground --

THE COURT: If I found there's not recreational immunity, wouldn't that create more incentive for more school districts saying, "There's snow on the ground. We're not going to let the kids go out for recess."

MS. KNOX-BAUER: I want the school -- to know what school districts are doing for some children. Give them some kind of break --

THE COURT: Maybe, maybe not.

MS. KNOX-BAUER: -- unless they're continuing

to have class, you know, much like junior high or high school throughout the entire day. But if they are giving the children breaks, they have to deal with the children somehow. They are giving them a break period, either putting them in a study hall or whatever, they have to deal with them. So this is not the kind of case that the Legislature intended recreational immunity to apply to.

There's questions of fact, disputed facts that a jury needs to decide in terms of whether there was negligence, and I would ask the Court to deny the Motion for Summary Judgment.

THE COURT: Any rebuttal, Mr. Graham?

MR. GRAHAM: Very briefly, Your Honor.

With respect to that issue on recreational immunity and the entering the premises for that purpose, I think, clearly, you can look at someone who may enter, for instance, a state park for a duel purpose. Perhaps they go only for the purpose of cooking some food, which is not a recreational activity, but, on the other hand, if they also enter for the purpose of cooking food and swimming and they are injured in the swimming activity, they have entered that premises for the purpose of that recreational activity.

Here counsel argues that she was required to go out for recess, and that is correct. I mean, they have

to go outside the building during that recess time period. However, they don't have to recreate. They can go outside and stand outside the doors if they want and talk to other kids and not engage in activities, such as she was, of sliding or jumping on a snowbank. That's a recreational activity. She said, "I did that because it was fun," and that's why she was doing it. It's to recreate. So she chose to engage in a recreational activity at the time of this accident.

I think the statute does apply here. Thank you.

THE COURT: Okay. Give me a moment here.

Okay. There is, I think, one continuing fact issue here and, that is, what was discussed at this meeting between the playground supervisor, Patty LaMarche, and the other playground aides, including Diane Halterman. Ms. Halterman thought, according to her deposition testimony, that she had some discretion on what to do with respect to monitoring the children's playing in the area of where plaintiff, Trista Auman, was injured. Ms. LaMarche's deposition testimony is more specific and was to the point that the kids weren't supposed to play there period. I don't know what the true facts are, so I think there is a fact issue of existence, or nonexistence, of a rule, and also on the issue of a known danger.

However, I don't find there is any issue of attractive nuisance here. Snow piles and snow-covered hills are not nuisances in Wisconsin because they exist all over the place in the winter, and the fact that there is a little hole, or a hole of some size anyway, on the other side of the snow pile doesn't make the snow pile automatically an attractive nuisance because you would find blocks of snow on the other side of these things, find bushes, trees, holes, fences, you name it, alongside snow piles all around Wisconsin in the winter and it would -- if this were an attractive nuisance, we would have a horrendous problem trying to flatten out every pile of snow that's pushed up by a grader or snowplow. It doesn't make any sense, as far as public policy, for that.

Furthermore, I think that, under the law of recreational immunity, Trista Auman was outside for recess or recreational purposes, whether recreation was talking with friends, playing games with friends or sliding down hills, and I'm satisfied here that the Recreational Immunity Doctrine does, in fact, apply and I believe that once that doctrine applies, that the other issues on the known danger and ministerial rules are overridden.

I think -- well, reflect on that again now. I asked both attorneys about this, actually, and I think the -- I think it's a close issue. I'm not sure every

judge would agree on this, but I think if the Court finds that recreational activity does not control the outcome of this case, then we have a situation where schools would be encouraged to limit children's activities any time there's a possibility that a kid could slip and fall on a playground or be injured on any kind of playground equipment.

And, with that in mind, I think my initial conclusion to find that recreational immunity is controlling ought to stand and I'm going to grant Mr. Graham's Motion for Summary Judgment because there's no issue of fact on the recreational immunity.

So with that decision, I think the claim is barred because of recreational immunity.

I would be happy to see what the Court of Appeals would do, but I think I got it right.

Is there anything else we have to decide today?

MR. GRAHAM: I don't think so, Your Honor.

THE COURT: Okay.

MS. KNOX-BAUER: Not that I know of.

THE COURT: Okay.

(Conclusion of record at 9:05 a.m.)

STATE OF WISCONSIN)

) ss. CERTIFICATE

COUNTY OF CHIPPEWA)

I, Eric W. Olson, Official Court Reporter in and for the County of Chippewa, State of Wisconsin, do hereby certify that I reported the above matter on July 17, 2000, and that the foregoing transcript, consisting of 19 pages, has been carefully compared by me with my stenographic notes as taken by me and by me thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this _____ day of _____, 2000.

_____

Eric W. Olson
Official Court Reporter

STATE OF WISCONSIN CIRCUIT COURT CHIPPEWA COUNTY

TRISTA AUMAN, a minor,
by her guardians,
KEVIN AUMAN AND RHONDA AUMAN

KEVIN AUMAN and RHONDA AUMAN,
In their individual capacity,

Plaintiffs,

vs.

ORDER GRANTING
SUMMARY JUDGMENT

Case No: 99 CV 200

SCHOOL DISTRICT OF STANLEY-BOYD,
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COMPANY, SECURITY LIFE INSURANCE
COMPANY OF AMERICA and
CLARK COUNTY,

Defendants.

FILED
CLERK OF CIRCUIT COURT
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The above matter came on for hearing on the 17th day of July, 2000, on motion for summary judgment by the Defendants, School District of Stanley-Boyd and Employers Mutual Casualty Company; the Plaintiffs, appearing by their attorneys, Salm & Knox-Bauer, by Ann N. Knox-Bauer, and the Defendants, School District of Stanley-Boyd and Employers Mutual Casualty Company, appearing by their attorneys, Weld, Riley, Prenn & Ricci, S.C., by Thomas J. Graham, Jr.; the court having reviewed the Defendants' Motion for Summary Judgment and supporting documentation, Plaintiffs' Response to Motion for Summary Judgment with supporting documentation, and Defendants' Reply Brief in Support of Motion for Summary Judgment, and having heard oral argument by the parties, now, therefore, the court finds and orders as follows:

1. The court finds an issue of fact thereby precluding summary judgment with respect to the issue of whether the actions of the School District were discretionary and whether the accident in question represented a known danger to the School District and, therefore, the court declines to grant summary judgment on this basis.

2. The court finds that the doctrine of attractive nuisance is not applicable in this case based upon the facts of the case.

3. The court grants summary judgment on the grounds that the claims of the Plaintiff are barred by the Recreational Use Statute §895.52, Wis. Stats.

IT IS HEREBY ORDERED that the Complaint of the Plaintiffs is dismissed with prejudice and with costs on the grounds that the claims of the Plaintiffs are barred by the Recreational Use Statute §895.52, Wis. Stats.

Dated this 21 day of July, 2000.

BY THE COURT:

/s/ Roderick A. Cameron
Roderick A. Cameron, Circuit Judge

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COURT OF APPEALS OF WISCONSIN

DISTRICT 3

TRISTA AUMAN, a minor,
by her guardians,
KEVIN AUMAN AND RHONDA AUMAN

KEVIN AUMAN and RHONDA AUMAN,
In their individual capacity,

Plaintiffs - Appellants,

Case No. 00-2356FT

vs.

Trial Court Case No: 99 CV 200

SCHOOL DISTRICT OF STANLEY-BOYD,
EMPLOYERS MUTUAL CASUALTY
COMPANY, SECURITY LIFE INSURANCE
COMPANY OF AMERICA and
CLARK COUNTY,

Defendants - Respondents.

BRIEF OF DEFENDANTS - RESPONDENTS

Appeal from a Summary Judgment Entered July 21, 2000
in the Circuit Court for Chippewa County, Wisconsin
Honorable Roderick A. Cameron, Presiding

WELD, RILEY, PRENN & RICCI, S.C.
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I. STATEMENT OF FACTS

Appellant correctly sets forth the Statement of Facts with the exception of one important omission. Plaintiff-Appellant, Trista Auman, testified that she was running, jumping and sliding on the pile of snow on which she broke her leg because it was fun for her. R.18, Affidavit of Thomas J. Graham, Jr. w/attachments (Trista Auman Deposition Transcript, pp. 28-29).

II. ARGUMENT

A. The Recreational Use Statute is Applicable to the Case at Bar.

Section 895.52, Wis. Stats., was enacted by the Wisconsin Legislature in 1983 (effective May 15, 1984) and is referred to as the "Recreational Use Statute". The express intent of the Legislature in enacting §895.52, Wis. Stats., was "to limit the liability of property owners toward others who use their property for recreational activities...." Further, the Legislature intended that "...this legislation be liberally construed in favor of property owners to protect them from liability." 1983 Wis. Act 418, §1. The policy behind the Recreational Use Statute is to encourage landowners to open their lands for the recreational use of others by removing a user's potential cause of action against the owner's alleged negligence. Linville v. City of Janesville, 184 Wis. 2d 705, 715, 516 N.W.2d 427 (1994).

Section 895.52, Wis. Stats., states in relevant part:

> **(2) No duty; immunity from liability.**
>
> (a) ...no owner and no officer, employe or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:
>
> 1. A duty to keep the property safe for recreational activities.
>
> 2. A duty to inspect the property....
>
> 3. A duty to give warning of an unsafe condition, use or activity on the property.
>
> (b) ...no owner and no officer, employe or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property....

"Owner" includes governmental bodies. Section 895.52(1)(d)1., Wis. Stats. "Recreational activity" is broadly defined as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure...." It also includes "game[s] or educational activity". Section 895.52(1)(g), Wis. Stats. The Legislature also stated that if an activity is not one of those enumerated in the Recreational Use Statute but is substantially similar in circumstance or activity, the statute should be broadly construed in favor of protecting the property owner from liability. 1983 Wis. Act 418, §1.

Whether an activity is recreational within the meaning of §895.52, Wis. Stats., is a question of law. In determining whether an activity is "recreational", a court

is to look at the nature, purpose and consequence of the activity. The injured person's subjective intent is relevant, but not dispositive. Sievert v. American Family Mut. Ins. Co., 180 Wis. 2d 426, 509 N.W.2d 75 (Ct. App. 1993); and Linville v. City of Janesville, 174 Wis. 2d 571, 497 N.W.2d 465 (Ct. App. 1993). Further, the determination of whether an activity is "recreational" under §895.52, Wis. Stats., does not turn on the nature of the property *owner's* activity. Rather, it depends upon the nature of the property *user's* activity. Sievert v. American Family Mut. Ins. Co., 190 Wis. 2d 623, 632, 528 N.W.2d 413 (1995), affirming 180 Wis. 2d 426, 509 N.W.2d 75 (Ct. App. 1993). Finally, there is nothing in the Recreational Use Statute that excludes minors from its application. Wirth v. Ehly, 93 Wis. 2d 433, 447, 287 N.W.2d 140 (1980) (citing then §29.68, Wis. Stats.).

In determining whether an activity was "recreational" within the meaning of §895.52, Wis. Stats., Wisconsin Courts have focused on the activity in which the user was engaged *at the time of injury* versus the user's activity upon entering the owner's property.

In Verdoljak v. Mosinee Paper Corp., 192 Wis. 2d 235, 531 N.W.2d 341 (Ct. App. 1995), affirmed by 200 Wis. 2d 624, 547 N.W.2d 602 (1996), the Court of Appeals found that where the plaintiff was en route from riding his dirt bike "for

fun" to a friend's house to continue the activity, he was engaged in a recreational activity when he rode into a gate on the defendant's property. The Court of Appeals rejected the plaintiff's argument that his activity at the time of injury could not be considered recreational because he had entered the landowner's property for the purpose of transportation:

> "To depict the event in different terms, 'for transportation' as Matthew argues, either by reference to Matthew's subjective dual purpose, or to segregate the trip into absolute rigid lines of activity, at one moment recreational and at another not, contravenes the statute's declaration that 'this legislation should be liberally construed in favor of property owners to protect them from liability.'"

Verdoljak, 192 Wis. 2d at 249-250.

In Lasky v. City of Stevens Point, 220 Wis. 2d 1, 582 N.W.2d 64 (Ct. App. 1998), the Court found that the plaintiff was engaged in a recreational activity where the plaintiff decided to walk through the park for the exercise while en route to the bakery and barbershop. The fact that he suffered injury when a plank broke on a bridge in the city owned park did not deprive the city of immunity based on the plaintiff's argument walking through the park did not constitute a recreational activity within the meaning of the Recreational Use Statute. Lasky, 220 Wis. 2d at 10.

In Linville v. City of Janesville, 184 Wis. 2d 705, 516 N.W.2d 427 (1994), affirming 174 Wis. 2d 571, 497 N.W.2d 465 (Ct. App. 1993), the plaintiff and her son were driven to a

city owned pond where the driver wanted to look at fishing spots for the next day. The vehicle they were in went into the pond with the driver and the plaintiff's son inside. The plaintiff argued that she was not engaged in a recreational activity at the time because she did not want to be at the pond. The Court rejected the plaintiff's argument finding that despite her assertion that she was at the pond against her will, the undisputed facts showed that she was there to look at fishing spots. Where fishing is one of the enumerated activities in the Recreational Use Statute and where the plaintiff was at a recreational facility at the time of injury, the Court concluded that she was engaged in a recreational activity. Linville, 184 Wis. 2d at 717.

The Recreational Use Statute clearly applies to the facts of the case at bar. Defendant- Respondent School District of Stanley-Boyd is an "owner" under §895.52(1)(d)1., Wis. Stats. Plaintiff-Appellant Trista Auman was engaged in a "recreational activity" at the time of her accident. Indeed, Trista agreed that the reason she was jumping and sliding on the mound of snow at the time of her accident was because it was fun for her. R.18, Affidavit of Thomas J. Graham, Jr. w/attachments (Trista Auman Deposition Transcript, pp. 28-29). This activity was an "outdoor activity undertaken for the purpose of exercise, relaxation or pleasure" under §895.52(1)(g), Wis. Stats.

Plaintiffs-Appellants argue that the Recreational Use Statute is inapplicable to this case because Trista was compelled to be on school grounds as a student. This approach is too broad. Rather, Wisconsin case law requires that Trista's activity *at the time she was injured* be examined. It is undisputed that Trista was jumping and sliding on a snow pile because it was fun for her. In other words, it was recreational. That Trista was originally at the school property to attend school does not take away from the recreational nature of her activity at the time of her injury. To focus on the purpose that brought Trista to the School District's property in the first place, as Plaintiffs-Appellants urge, is to focus on the activity of the property owner, not the property user. This approach was rejected in Sievert v. American Family Mut. Ins. Co., 190 Wis. 2d 623, 632, 528 N.W.2d 413 (1995) as an improper method of determining whether an activity is recreational.

The fact that Trista was required to be outside during recess also does not negate the recreational nature of jumping and sliding on the snow pile. Indeed, nothing required that Trista engage in this particular activity. She could have engaged in another activity or simply stood along the school building doing nothing. A court is to look at the nature, purpose and consequence of the activity in determining whether the activity is recreational within the meaning of §895.52, Wis. Stats. Sievert v. American Family

Mut. Ins. Co., 180 Wis. 2d 426, 509 N.W.2d 75 (Ct. App. 1993). Where Trista spent her time jumping and sliding on this snow pile because it was fun - the essence of recreation - it is clear she was engaging in a recreational activity.

Also enumerated as a recreational activity in §895.52, Wis. Stats., is "educational activity". Where Plaintiffs-Appellants argue that recess was part of the curriculum in which Trista was compelled to engage, her activity during recess was an educational activity under §895.52, Wis. Stats. Plaintiffs-Appellants disagree with this and argue that "educational activity" as used in §895.52,Wis. Stats., does not "seem" to refer to recess activities. Instead, Plaintiffs-Appellants state that "educational activity" "seems to be referring to a voluntary engagement of one's self in an outdoor learning experience...." Plaintiffs-Appellants' Brief, p. 8. Plaintiffs-Appellants cite no authority for their interpretation of "educational activity". Further, as the Court pointed out in Linville v. City of Janesville, participation in a recreational activity does not have to be voluntary. Linville, 184 Wis. 2d 705, 516 N.W.2d 427 (1994).

Finally, Plaintiffs-Appellants' argument that Trista's activity was not an "educational activity" is disingenuous. On the one hand, they assert that Trista was jumping and sliding at recess as part of the school's required

curriculum, notwithstanding that it was fun for her. On the other hand, they claim that even though the activity was part of the curriculum, it cannot be considered an "educational activity" as enumerated in the Recreational Use Statute. Plaintiffs-Appellants want to have it both ways, but cite no authority in support of their arguments.

Because Defendant-Respondent School District is an "owner" under the Recreational Use Statute and because Plaintiff-Appellant Trista Auman was engaged in a recreational activity at the time of her injury, the Recreational Use Statute applies to the case at bar.

B. The Policy Behind the Recreational Use Statute is Promoted by its Application to the Case at Bar.

As stated above, the Wisconsin Legislature enacted §895.52, Wis. Stats., for the purpose of encouraging land owners to permit their land to be used for recreational activity without the threat of being held liable for injuries that may occur to the users. Linville v. City of Janesville, 184 Wis. 2d 705, 715, 516 N.W.2d 427 (1994). This policy applies to a municipal owner as well as a private owner.

Applying the Recreational Use Statute to the facts of this case will further the purpose of the statute. Schools allow children on their playgrounds during recess periods because it is good for the students. Recess permits grade school children to burn off energy and have fun. But

schools do so with the expectation that they will not be held liable for each and every playground accident a student suffers. If a school district is open to liability from every student who has an accident on a playground during recess, it will not be long before recess also is eliminated from the curriculum as being too costly to a school district and tax payers due to the liability involved. Prohibiting lawsuits against school districts under circumstances such as in this case will help ensure the continued use of school property by students to recreate during school hours.

C. Application of the Recreational Use Statute will not Abrogate the Duty owed by School Districts to Students.

Plaintiffs-Appellants argue that applying the Recreational Use Statute to the case at bar will abrogate the common law duty school personnel owe to students in their care. Plaintiffs-Appellants' Brief, pp. 8-10. Defendants-Respondents object to this argument because it presents an issue not previously raised before the Trial Court. A reviewing court normally will not consider an issue raised for the first time on appeal. Wood v. Milan, 134 Wis. 2d 279, 290, 397 N.W.2d 479 (1986). To address an issue raised for the first time on appeal may work a hardship on the adverse party. In addition, it deprives the reviewing court of the informed thinking of the trial court on the matter. Terpstra v. Soiltest, Inc., 63 Wis. 2d 585,

592, 218 N.W.2d 129 (1974). Without waiving its objection, Defendants-Respondents respond to this new issue.

In Ervin v. City of Kenosha, 159 Wis. 2d 464, 464 N.W.2d 654 (1991), two minors drowned at a city owned and operated beach. The city had employed lifeguards at the beach. The parents of the minors sued the city alleging, *inter alia*, that the city was negligent in failing to train and instruct the lifeguards. Further, the parents alleged that the lifeguards were negligent in performing their duties and that the city was vicariously liable for the negligence of the lifeguards. Ervin, 159 Wis. 2d at 469-71. The parents argued that when the city provided lifeguards at the beach, it assumed a duty to provide lifeguard services in a non-negligent manner and, in failing to do so, it was liable. The parents relied upon the common law principle of liability for gratuitous actions pursuant to American Mut. Liab. Ins. Co. v. St. Paul Fire & Marine Ins. Co., 48 Wis. 2d 305, 313, 179 N.W.2d 864 (1970). Ervin, 159 Wis. 2d at 476. The Court acknowledged that application of the Recreational Use Statute in the case was in conflict with the common law duty arising from gratuitous actions. However, the Court found that the Legislature clearly expressed an intent to change conflicting common law when it enacted §895.52, Wis. Stats.:

> "The clear legislative intent was to construe sec. 895.52, Stats., in favor of landowners to protect them from liability. 1983 Wis. Act 418, sec. 1.

> For this reason, the principle enunciated in American Mutual cannot be used to narrow the scope of immunity under sec. 895.52. Rather, this statute acts to protect the City from liability even though it gratuitously provided lifeguards."

Id., 476-77.

The same result must be reached in the case at bar. In the narrow circumstance of children recreating on school district property, the Recreational Use Statute holds the school district immune from liability if one of its employees allegedly fails to properly supervise one of the children. To hold otherwise would be to nullify the effect of the Recreational Use Statute.

Plaintiffs-Appellants cite Bystery v. Village of Sauk City, 146 Wis. 2d 247, 430 N.W.2d 611 (Ct. App., 1988) as an example of the Court of Appeals (District Four) refusing to apply the Recreational Use Statute where there exists a *statutory* duty on a municipality to maintain its sidewalks. As pointed out by this Court in Verdoljak v. Mosinee Paper Corp., supra., the Bystery Court went too far in its decision by stating that §895.52, Wis. Stats. and §81.15, Wis. Stats., were in "apparent conflict". It need not have attempted to resolve the conflict and should have simply pointed out that where §81.15, Wis. Stats., applied because a highway or sidewalk is not withdrawn from transportation uses, the question of the application of §895.52, Wis. Stats., never arises. Thus, it was unnecessary for the

Bystery Court to decide the application of the Recreational Use Statute. Verdoljak, 192 Wis. 2d at 247-48.

Unlike Bystery, application of the Recreational Use Statute is necessary to the resolution of the case at bar. Further, Bystery is distinct from the case at bar since there is no statutory duty that allegedly was violated by the School District. As a result, the analysis and holding of Bystery is not dispositive in this case.

Plaintiffs-Appellants further argue that application of the Recreational Use Statute in this case "would effectively eliminate the school's duty to supervise students during physical education classes, academic classes or activities during school hours that are held outside on school premises." Plaintiffs-Appellants' Brief, p.9. Plaintiffs-Appellants' argument ignores the requirement under the Recreational Use Statute that a "recreational activity" be engaged in for the Statute to be applicable. Section 895.52(2), Wis. Stats.

In physical education classes, academic classes or activities held outside on school premises, the students are not engaged in recreational activity. They are engaged in required course study or academic activity. The students do not have a choice of activities in which to engage. If a student engages in activity other than that required in the course, he/she will be reprimanded and/or suffer a lower grade. Further, physical education classes and various

academic classes are required instruction by Wisconsin public schools and completion of them is necessary for students to move from one grade to the next. See §§118.01 and 118.15, Wis. Stats. In contrast, students at recess engage in their choice of a variety of activities. They will not be reprimanded if they do not engage in one particular activity. Students are not graded or otherwise evaluated academically based upon their performance at recess. Finally, recess is not a required class and students will not be held back if they do not participate in it. A school district does not have to allow students to go outside to play at recess. And if schools are to be held liable for every injury suffered by a student on the playground, surely they will discontinue recess to avoid the liability stemming from it.

III. CONCLUSION

The Recreational Use Statute is applicable to the case at bar. Defendant-Respondent Stanley-Boyd School District is an "owner" as defined in §895.52, Wis. Stats. Plaintiff-Appellant Trista Auman was engaging in a "recreational activity" within the meaning of the Recreational Use Statute at the time she was injured. Accordingly, Defendants-Respondents are immune from liability for Trista Auman's injury.

Application of the Recreational Use Statute promotes the policy of the Statute. Where the policy behind the

enactment of §895.52, Wis. Stats., is to encourage land owners to permit their property to be used for recreational purposes, this policy is promoted where school districts will continue to permit their properties to be used for recreation by their students. To hold a school district liable for injuries suffered by a student during recess on the playground would contravene the purpose of the statute and discourage school districts from permitting students to recreate on their properties.

Application of the Recreational Use Statute to the case at bar does not abrogate the duty school district personnel owe to their students in all instances. Section 895.52, Wis. Stats., will hold a school district immune from liability when a student is injured *only while engaged in a recreational activity*. However, it will not serve as a blanket of immunity for teachers who are negligent in the instruction or supervision of classes or activities that are not recreational activities within the meaning of §895.52, Wis. Stats.

For these reasons, Defendants-Respondents respectfully request the Court to affirm the Trial Court and hold that Plaintiffs-Appellants' claims are barred by the Recreational Use Statute.

Dated this 20th day of November, 2000.

WELD, RILEY, PRENN & RICCI, S.C.
Attorneys for Defendants,
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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c), Wis. Stats., as modified by the Court's order, for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 15 pages.

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is _____ words.

Dated: November 20, 2000.

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

TRISTA AUMAN, a minor,
by her guardians,
KEVIN AUMAN AND RHONDA AUMAN

KEVIN AUMAN and RHONDA AUMAN,
In their individual capacity, Case number: 00-2356

Plaintiffs-Appellants,

SCHOOL DISTRICT OF STANLEY-BOYD,
EMPLOYERS MUTUAL CASUALTY COMPANY,
SECURITY LEFE INSURANCE COMPANY
OF AMERICA and CLARK COUNTY,

Defendants-Respondents.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

I. THE COURT SHOULD NOT APPLY RECREATIONAL IMMUNITY TO THIS CASE, WHERE PLAINTIFF WAS ENGAGED IN MANDATORY RECESS DURING SCHOOL HOURS.

This Court should not apply the doctrine of recreational immunity to this situation, where a student is required to be outside on the playground during a school recess, and is injured while playing on a snow hill because its application cannot be distinguished from any situation where a student is injured on school premises during school hours.

First, this Court can consider the **argument** the appellants raised in their brief in chief—that is that application of recreational immunity would effectively exempt all school activities from liability. In Terpstra v. Soiltest, Inc., 63 Wis.2d 585, 218

N.W.2d 129 (Wis. 1974), the plaintiff, for the first time, raised the issue of what legal duty landowners should have to people coming onto their land. Id., 63 Wis.2d at 592. By contrast, in the present case, appellants are simply making another argument or giving another reason why the issue should be decided in our favor. Further, the standard that this Court should apply is the de novo standard, which allows the Court to consider all the public policy reasons and to look "anew" at the issue, regardless of the reasoning used by the trial court.

Second, this Court needs to decide which public policy was intended to be furthered by the legislature—the policy of encouraging school districts to have recess, or the policy of encouraging school personnel to supervise students in public school. A court is to look at the nature, purpose and consequence of the activity the plaintiff was engaging in at the time of the injury to determine whether recreational immunity applies. Sievert v. American Family Mut. Ins. Co., 180 Wis.2d 426, 509 N.W.2d 75 (Ct. App. 1993). The defendants-respondents argue that the plaintiff was not required to jump on the snow hill, which is true. (Respondent's Brief, page 6). They assert that the plaintiff could have been "engaged in another activity or simply stood along the school building doing nothing." (Id.) However, had the plaintiff been injured during recess while engaged in another activity, or while simply standing next to the school building during recess, using the Defendant-Respondents' analysis, recreational immunity would also apply because the plaintiff would be engaged in an "outdoor activity undertaken for the purpose of exercise, relaxation or pleasure." Wis. Stat. section 895.52(1)(g). There is no meaningful distinction to be made between jumping on a snow hill or standing next to the school building, or engaging

in any other activity during recess. All of those activities are simply ways that a student can pass the time during recess, until the bell rings, signaling the start of classes again. The plaintiff would not have been on the snow hill but for the fact that she had to be on the playground during recess, and she was jumping on the snow hill as a way of passing time.

Third, the Defendants-Respondents assert that a finding of recreational immunity will not abrogate the duty that a school district owes to its students because the immunity will not apply to physical education classes, academic classes or school activities held outside, since those activities are not recreational in nature. (Defendants-Respondents Brief, page 12). They reason that students in physical education classes, academic classes or school activities outside are not engaged in recreational activity because they are "engaged in a required course of study or academic activity." (Defendants-Respondents' Brief, page 12). "The students do not have a choice of activities in which to engage." (Id, page 12). This argument that the Defendants-Respondents use is precisely the reason why recess activity should be treated differently than "recreational activity." The plaintiff in this case did not have a choice but to occupy herself during a mandatory outdoor recess. It did not matter if she jumped on a snow hill, engaged in some other activity, or simply stood next to the school building.

Finally, the result of Defendants-Appellants' analysis is that public schools do not have a duty to supervise students playing outside during recess, and that they are absolved from any liability for injuries that occur during recess activities. If this Court finds that recreational immunity applies to the plaintiff's activity during recess,

it will then be up to school districts to gratuitously provide school personnel to supervise students during recess. The policy of encouraging school districts to hold recess will become paramount to that of encouraging the safety of students during recess.

Dated this 5th day of December, 2000.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c), Wis. Stats., as modified by court order, for a brief and appendix produced with a proportional font. The length of this brief is four (4) pages and 844 words.

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